

1 AND I WILL DISCUSS THOSE APPENDICES HERE.

2 BUT I'D LIKE TO SORT OF START ORALLY WITH WHAT I
3 THINK IS THE APPENDIX THAT WE MIGHT PROVIDE TO THE COURT,
4 AND THAT APPENDIX GOES BACK AND STARTS WITH TWO SUPREME
5 COURT CASES WHICH ARE STILL GOOD LAW TODAY AND HAVE NEVER
6 BEEN OVERRULED. AND THE FIRST OF THOSE IS O'REILLY V.
7 MORSE, MORSE CODE, THE TELEGRAPH. AND I DON'T BELIEVE --
8 THEY CAN QUIBBLE WITH US IF THEY WOULD LIKE --

9 THE COURT: WE DON'T HAVE ANY QUIBBLING IN THIS
10 COURTROOM.

11 MR. HASLAM: WE ONLY DO IT OUTSIDE. WE ONLY DO
12 IT OUTSIDE, AND THERE IS A MINIMUM OF THAT. I ARGUE; THEY
13 QUIBBLE.

14 IN MORSE, WHICH WAS, I GUESS, ARGUABLY IF YOU
15 WANT TO THROW THE TERM LOOSELY AROUND, A PIONEERING
16 INVENTION -- ALTHOUGH I'M NOT SURE WHAT THE SIGNIFICANCE
17 OF HAVING SAID THAT IS -- WAS PROBABLY SOMETHING THAT
18 PEOPLE AT THE TIME, AND MAYBE EVEN NOW, WOULD SAY WAS
19 REASONABLY PIONEERING. THE CLAIM -- AND ADMITTEDLY, THE
20 CLAIMS WERE DRAFTED SOMEWHAT DIFFERENTLY THERE, BUT THE
21 CLAIM THAT THE COURT WAS CONSIDERING WAS THIS. AND IT'S
22 ON PAGE 35 OF 56 U.S. 62, WHICH I BELIEVE MAY BE A LEXIS
23 CITE. NO, IT'S 56 U.S. 62.

24 AND I'M READING FROM -- WELL, NOW I TRIED TO
25 MOVE TO THE DIGITAL WORLD. I'LL GET THE CITE. I'M

1 READING, OBVIOUSLY, FROM A LEXIS PRINTOUT, AND IT'S NOT
2 PAGINATED THE WAY IT IS IN THE U.S. REPORTS.

3 BUT HERE IS WHAT THE CLAIM SAID, AND WE WILL
4 PROVIDE THE CITE.

5 "I DO NOT PROPOSE TO LIMIT MYSELF TO THE
6 SPECIFIC MACHINERY OR PARTS OF MACHINERY
7 DESCRIBED IN THE FOREGOING SPECIFICATION AND
8 CLAIMS."

9 THAT COULD BE SAID ABOUT CYLINK, HERE. AND HERE
10 WE GO TO WHAT I THINK TROUBLED THE COURT THERE.

11 "THE ESSENCE OF MY INVENTION BEING THE USE OF
12 THE MOTIVE POWER OF THE ELECTRIC OR GALVANIC
13 CURRENT, WHICH I CALL ELECTROMAGNETISM, HOWEVER
14 DEVELOPED FOR MARKING OR PRINTING INTELLIGIBLE
15 CHARACTERS, SIGNS, OR LETTERS, AT ANY DISTANCES,
16 BEING A NEW APPLICATION OF THAT POWER OF WHICH
17 I CLAIM TO BE THE FIRST INVENTOR OR DISCOVERER."

18 I THINK IN TERMS SIMILAR TO WHAT'S BEING CLAIMED
19 HERE, THAT THE GENERATION OF KEYS AND THE PROCESSING OF
20 MESSAGES, HOWEVER DELINEATED, IS TO GENERATE SECRET OR
21 DECIPHERED MESSAGES I CLAIM FOR MYSELF.

22 AND THE PROBLEM THAT THE SUPREME COURT HAD IN
23 MORSE WASN'T THAT THEY THEY COULDN'T GO TO A DICTIONARY
24 AND UNDERSTAND WHAT "GALVANIC CURRENT" MEANT OR WHAT
25 "ELECTROMAGNETISM" MEANT OR WHAT "INTELLIGIBLE CHARACTERS"

1 OR "SIGNS" OR "LETTERS" OR ANY OTHER WORD, THEIR CONCERN
2 WAS THE OVERBREADTH AND INDEFINITENESS OF THAT CLAIM.

3 AND THEY SAID SUCH THINGS AS THIS, AND I'M,
4 AGAIN, READING FROM PAGE 35:

5 "FOR AUGHT THAT WE NOW KNOW SOME FUTURE
6 INVENTOR, IN THE ONWARD MARCH OF SCIENCE, MAY
7 DISCOVER A MODE OF WRITING OR PRINTING AT A
8 DISTANCE BY MEANS OF THE ELECTRIC OR GALVANIC
9 CURRENT, WITHOUT USING ANY PART OF THE PROCESS
10 OR COMBINATION SET FORTH IN THE PLAINTIFF'S
11 SPECIFICATION."

12 AND THEY GO ON TO SAY:

13 "BUT YET IF IT IS COVERED BY THIS PATENT THE
14 INVENTOR COULD NOT USE IT, NOR THE PUBLIC HAVE
15 THE BENEFIT OF IT WITHOUT THE PERMISSION OF THIS
16 PATENTEE."

17 AND THEY WENT ON TO HOLD THAT THAT CLAIM WAS
18 INVALID BECAUSE IT WAS TOO BROAD AND INDEFINITE.

19 MORSE, I BELIEVE, LIVES TODAY. ALTHOUGH IT MAY
20 LIVE IN A DIFFERENT SECTION OR A SPECIFIC SECTION OF THE
21 PATENT STATUTE, IN IN RE HYATT, 708 F.2D 712, WHICH WAS A
22 SINGLE MEANS CLAIM, WHICH IS DIFFERENT THAN THE SPECIFIC
23 CLAIMS HERE, THE COURT DID DISCUSS THAT WHAT MORSE STOOD
24 FOR WAS OVERBREADTH, FINDS MEANING AND CONTENT IN THE
25 CURRENT STATUTE AT SECTION 112, PARAGRAPH ONE.

1 AND HERE'S WHAT THEY SAID, AGAIN, CITING AT PAGE
2 THREE OF WHAT I'VE GOT, AND I GUESS IT IS PAGE 708 F.2D
3 714. TALKING ABOUT MORSE:

4 "THUS, THE CLAIM IS PROPERLY REJECTED UNDER
5 MORSE FOR WHAT USED TO BE KNOWN AS UNDUE BREADTH
6 BUT HAS SINCE BEEN APPRECIATED AS BEING MORE
7 ACCURATELY BASED ON THE FIRST PARAGRAPH OF
8 SECTION 112."

9 THEN IT GOES ON TO SAY, AT THE BOTTOM OF THAT
10 SAME PAGE, 714:

11 "A CLAIM WHICH IS OF SUCH BREADTH THAT IT
12 READS ON SUBJECT MATTER AS TO WHICH THE
13 SPECIFICATION IS NOT ENABLING SHOULD BE REJECTED
14 UNDER THE FIRST PARAGRAPH OF SECTION 112 RATHER
15 THAN THE SECOND."

16 AND IT GOES ON TO SAY, AND I THINK WHAT IS OF
17 PARTICULAR SIGNIFICANCE HERE, THE FINAL PARAGRAPH OF
18 SECTION 112, THAT'S PARAGRAPH SIX: "SAVES COMBINATION
19 CLAIMS DRAFTED USING MEANS PLUS FUNCTION FORMAT FROM THIS
20 PROBLEM," NOT THE PROBLEM THAT I CAN'T GO TO A DICTIONARY
21 AND FIND A WORD, BUT IT SAVES IT FROM THE PROBLEM OF
22 INDEFINITENESS AND UNDUE BREADTH BY PROVIDING A
23 CONSTRUCTION, WHICH IS WHAT THE COURT DOES IN A MARKMAN
24 HEARING, OF THAT FORMAT NARROW ENOUGH TO AVOID THE PROBLEM
25 OF UNDUE BREADTH IS FORBIDDEN BY THE FIRST PARAGRAPH.

1 SO MORSE, WHICH WAS DECIDED BACK IN 1854, WAS
2 RECENTLY REAFFIRMED IN 1983, AND BROUGHT INTO THE CURRENT
3 PATENT STATUTE.

4 THE SECOND SUPREME COURT CASE WHICH WOULD BE AT
5 THE HEAD OF OUR APPENDIX IS THE HALLIBURTON CASE. IN
6 HALLIBURTON, THE SUPREME COURT REVIEWED A COMBINATION
7 CLAIM FOR AN APPARATUS COMPRISING A COMBINATION OF
8 ELEMENTS, WHERE ONE ELEMENT WAS WRITTEN IN MEANS PLUS
9 FUNCTION FORM.

10 AND AMONG THE LANGUAGE THAT THE COURT WAS
11 CONCERNED WITH AND DISCUSSING WAS A MEANS ASSOCIATED WITH
12 SAID PRESSURE RESPONSIVE DEVICE FOR TUNING SAID RECEIVING
13 MEANS TO THE FREQUENCY OF ECHOES FROM THE TUBING COLLARS,
14 ET CETERA, AND IT WENT ON.

15 AND THE COURT HELD THAT CLAIM INVALID FOR
16 SIMILAR REASONS. IT WAS UNDUE BROADNESS, AMBIGUITY, AND
17 WHAT THE SUPREME COURT SAID WAS THE OVERHANGING THREAT OF
18 A FUNCTIONAL CLAIM SUCH AS THAT.

19 AND I WOULD SUBMIT -- THE COURT DOESN'T SUGGEST
20 OR SAY IN HERE -- BUT I WOULD NOTE THAT THAT CLAIM
21 INCLUDES WHAT CYLINK CALLS AN ACTION VERB, TUNING, WHICH
22 I'M SURE IN THAT ART, YOU COULD HAVE GONE TO EITHER A
23 DICTIONARY -- WHICH THIS DEALS WITH SOME SORT OF AN
24 ACOUSTICAL RESONATOR -- YOU COULD HAVE GONE TO PEOPLE AND
25 SAID, "WHAT DOES TUNING IN AN ACOUSTICAL RESONATOR MEAN?"

1 AND THEY PROBABLY SAID, "I UNDERSTAND WHAT THAT
2 MEANS."

3 BUT THAT WASN'T THE CONCERN THAT THE COURT HAD.
4 THE CONCERN WAS THAT YOU WOULD HAVE THIS BROAD, AMBIGUOUS,
5 AND UNDULY FUNCTIONAL CLAIM BECOMING A THREAT. AND THEY
6 SAID, IN LANGUAGE ON 329 U.S. 1, PAGE 10, THE LANGUAGE I
7 THINK EQUALLY APPLICABLE HERE:

8 (READING) IN THIS AGE OF TECHNOLOGICAL DEVELOPMENT,
9 THERE MAY BE MANY OTHER DEVICES BEYOND OUR
10 PRESENT INFORMATION WHERE INDEED OUR IMAGINATION
11 WILL PERFORM THAT FUNCTION AND YET FIT THESE
12 CLAIMS. AND UNLESS FRIGHTENED FROM THE
13 COURSE OF EXPERIMENTATION BY BROAD FUNCTIONAL
14 CLAIMS LIKE THESE, INVENTIVE GENIUS MAY INVOLVE
15 MANY MORE DEVICES TO ACCOMPLISH THE SAME
16 PURPOSE."

17 I WOULD SUBMIT THAT THERE, IN HALLIBURTON, THE
18 SUPREME COURT AGAIN VOICED THE SAME CONCERN THAT IT VOICED
19 IN MORSE, AND STILL ANIMATES THE PATENT LAWS TODAY. WE
20 WANT TO ENCOURAGE INNOVATION, NOT STIFLE IT.

21 NOW, ADMITTEDLY, HALLIBURTON HAS BEEN AFFECTED
22 BY CONGRESS. CONGRESS' RESPONSE TO HALLIBURTON WAS TO
23 CARVE OUT AN EXCEPTION. AND IT OVERRULED THE SPECIFIC
24 HOLDING OF HALLIBURTON. BUT IT DIDN'T GO TO SAY: WE
25 DON'T CARE WHETHER CLAIMS ARE WRITTEN IN THAT BROAD

1 FUNCTIONAL LANGUAGE. IT'S NOT A CONCERN OF CONGRESS' OR
2 THE PATENT STATUTES.

3 WHAT THEY SPECIFICALLY ENDORSED IS: WE WILL LET
4 YOU WRITE BROAD FUNCTIONAL CLAIMS THAT WOULD, ON THEIR
5 FACE, LIKE THESE, BE INDEFINITE, BUT WE WILL SAVE THOSE
6 CLAIMS BY LIMITING THEM TO WHAT YOU ACTUALLY DISCLOSE AS
7 YOUR INVENTION, OR THE VARIETIES OF YOUR INVENTION AND THE
8 EQUIVALENTS. AND THAT'S A FAIR TRADE.

9 IF YOU THINK YOU'VE INVENTED, IF
10 PROFESSOR HELLMAN HAD INVENTED MANY VARIOUS SPECIES OF
11 PUBLIC KEY CRYPTOGRAPHY, HE COULD HAVE DISCLOSED THEM ALL,
12 AND HE WOULD HAVE HAD A CLAIM TO EACH ONE OF THOSE AND
13 THEIR EQUIVALENTS. AND THE NUMBER THAT HE MIGHT HAVE BEEN
14 ENTITLED TO CLAIM MIGHT HAVE BEEN ESSENTIALLY BROADER.

15 BUT HE ONLY INVENTED ONE. HE INVENTED THE TRAP
16 DOOR KNAPSACK. AND WHAT HE'S NOW TRYING TO DO IS TO
17 BROADEN IT FAR BEYOND ANYTHING THAT HE CONCEIVED OF AT THE
18 TIME OR INVENTED AT THE TIME.

19 AND I THINK IT'S IMPORTANT TO NOTE THAT
20 CONGRESS, IN PASSING 35 U.S.C. 112, PARAGRAPH SIX, LEFT
21 HALLIBURTON IN PLACE TO THE EXTENT YOU WRITE A CLAIM WHICH
22 IS STILL INDEFINITE AND BROAD, AND YOU DON'T SAVE IT BY
23 112, PARAGRAPH SIX.

24 IN OTHER WORDS, I THINK THAT A PLAINTIFF OR A
25 PATENTEE HAS A CHOICE. AND I THINK REALLY IT IS NOT A

1 CHOICE, BECAUSE IT'S ONE THAT THE COURT APPLIES, AND THAT
2 IS, THAT IF IT DOES NOT WANT TO BE RESTRICTED TO THE
3 SPECIFICATION AS GIVING CONTENT TO A BROAD FUNCTIONAL
4 CLAIM, THEN IT IS UNDER AN OBLIGATION NOT TO WRITE CLAIMS
5 IN THAT KIND OF BROAD, FUNCTIONAL LANGUAGE.

6 NOW LET'S BRING IT UP TO THE MODERN ERA, IF I
7 CAN, AND THE MOST RECENT PRONOUNCEMENT BY THE FEDERAL
8 CIRCUIT ON THIS. AND I GUESS BOTH SIDES AGREE THAT AT
9 LEAST A MORE RECENT -- OR ONE OF THE MORE RECENT CASES IS
10 GREENBERG VERSUS ETHICON ENDOSURGERY, INC. AND THE CITE I
11 HAVE IS 39 U.S. PATENT QUARTERLY 2ND 1783.

12 NOW, CYLINK DOES TELL THE COURT THAT IT'S THE
13 GUIDING CASE, AND IT'S THE MOST RECENT PRONOUNCEMENT ON
14 THE SUBJECT. AND I BELIEVE THAT THEY ARGUE THAT WHAT
15 GREENBERG SAYS IS: IF YOU DON'T SEE THE MAGIC WORDS
16 "MEANS FOR" OR "STEP FOR" IN A CLAIM, IT IS NOT A MEANS
17 PLUS FUNCTION CLAIM OR A STEP PLUS FUNCTION CLAIM, AND
18 SHOULDN'T BE READ PURSUANT TO 35 U.S.C. 112.6.

19 BUT I THINK THAT'S NOT A FAIR READING OF WHAT
20 THE COURT IN GREENBERG DID. ADMITTEDLY, IN GREENBERG, THE
21 COURT REVERSED A DISTRICT COURT ORDER WHICH HAD APPLIED
22 112.6 TO A CLAIM NOT SPECIFICALLY WRITTEN.

23 BUT I THINK FOR PURPOSES HERE, IT'S WHAT THE
24 COURT SAID ON PAGE 1786 WHICH IS OF IMPORTANCE. AND THEY
25 SAY THAT: WE DO NOT MEAN TO SUGGEST THAT SECTION 112,

1 PARAGRAPH SIX, IS TRIGGERED ONLY IF THE CLAIM USES THE
2 WORD "MEANS."

3 THE PATENT AND TRADEMARK OFFICE HAS REJECTED
4 THAT ARGUMENT, THAT ONLY THE MEANS WILL INVOKE SECTION
5 112, PARAGRAPH SIX. AND HERE, I THINK IT'S IMPORTANT,
6 BECAUSE IT DOES GO, I THINK, TO THE CREDIBILITY OF THE
7 CASE AND THE CASE CITATIONS THAT CYLINK HAS MADE TO YOU.

8 THE COURT GOES ON TO SAY, "AND WE AGREE," CITING
9 THE RAYTHEON CASE. AND THE PARENTHETICAL THAT THEY
10 INCLUDE IS THE CONSTRUING FUNCTIONAL LANGUAGE INTRODUCED
11 BY SOME THAT THE TO BE EQUIVALENT TO MEANS FOR CLAIM
12 LANGUAGE.

13 NOW, CYLINK READS THE RAYTHEON CASE AS STANDING
14 FOR THE PROPOSITION THAT THE COURT APPLIED SECTION 112,
15 PARAGRAPH SIX, IN SPITE OF THE PRESENCE OF "SO THAT"
16 LANGUAGE.

17 THE FEDERAL CIRCUIT IN GREENBERG SAID, NO, IT
18 WAS BECAUSE OF THE "SO THAT" LANGUAGE IN THAT CASE THAT
19 THEY APPLIED SECTION 112, PARAGRAPH SIX. AND THEY DID IT
20 AGAIN, NOT BECAUSE -- I SUBMIT YOU CAN GO BACK TO THE
21 CLAIM LANGUAGE IN RAYTHEON, AND YOU CAN GO TO A
22 DICTIONARY, AND YOU CAN FIND A MEANING FOR EVERY WORD --
23 THEY DIDN'T MAKE UP ANY HERE -- AND THE COURT STILL SAID:
24 THIS IS TOO FUNCTIONAL; IT'S TOO BROAD; IT'S TOO
25 INDEFINITE; AND THEREFORE, IT'S SUBJECT TO 112, PARAGRAPH

1 SIX.

2 AND SECOND, I THINK THE COURT STRESSED THAT IN
3 THAT CASE, THE DISTINGUISHING FACTOR WAS THAT THE WORD
4 "DETENT MECHANISM" HAD A WELL-UNDERSTOOD STRUCTURAL
5 CONTENT IN THE ART. AND I THINK HERE THAT THE TESTIMONY
6 IS THAT THAT IS NOT THE CASE HERE.

7 PROFESSOR KONHEIM SAID -- AND I THINK FAIRLY
8 READ, AND I SAT HERE AND LISTENED TO HIS TESTIMONY -- IT
9 WASN'T SO MUCH THAT HE COULDN'T GO TO A DICTIONARY AND
10 FIND ALL OF THE WORDS; IT WAS THAT WHEN HE LOOKED AT WHAT
11 HE HAD AFTER DOING THAT, IT REALLY TOLD HIM WHAT HE WAS TO
12 ACCOMPLISH BUT NOT HOW TO DO IT.

13 AND I'D LIKE TO JUST PUT UP I THINK WHAT ARE TWO
14 OF THE CRITICAL ELEMENTS THAT WE'RE TALKING ABOUT HERE,
15 AND THEY'RE WHAT WE'VE LABELED AS CLAIM ELEMENTS 1(C),
16 WHICH IS GENERATING THE SECRET KEY, AND CLAIM ELEMENT
17 1(E), WHICH IS ENCIPHERING THE MESSAGE.

18 AND I SAY THAT THESE ARE THE CRITICAL STEPS
19 BECAUSE I THINK THIS IS WHERE YOU FIND, IF ANYTHING, THE
20 LANGUAGE WHICH WAS INTENDED TO TRY TO DISTINGUISH THE
21 PRIOR ART AND WHICH WAS INTENDED TO SET FORTH THE
22 ESSENTIAL RELATIONSHIPS THAT PROFESSOR HELLMAN AND
23 MR. MERKLE PUBLISHED EARLIER AND ATTEMPTED TO PATENT HERE
24 IN THE TRAP DOOR KNAPSACK.

25 1(C) SAYS: "GENERATING FROM SAID RANDOM NUMBERS

1 A SECRET DECIPHERING KEY AT THE RECEIVER SUCH THAT THE
2 SECRET DECIPHERING KEY IS DIRECTLY RELATED TO AND
3 COMPUTATIONALLY INFEASIBLE TO GENERATE FROM THE PUBLIC
4 ENCIPHERING KEY."

5 I DON'T THINK THERE IS ANY DISPUTE THAT THE
6 LANGUAGE AFTER "SUCH THAT" DOESN'T TELL YOU ANYTHING ABOUT
7 HOW TO ACCOMPLISH THAT RESULT. IT IS TALKING ABOUT
8 ATTRIBUTES OF SOME OTHER ACT.

9 AND THE OTHER ACT, IF THERE IS TO BE CONTENT
10 HERE, IS, "GENERATING FROM SAID RANDOM NUMBERS A SECRET
11 DECIPHERING KEY AT THE RECEIVER."

12 BUT THAT DOESN'T TELL YOU ANYTHING. ALMOST THAT
13 SAME LANGUAGE IS IN THE PRIOR ART IN MULTIUSER, EXHIBIT
14 1001. THE PARADIGM OF PUBLIC KEY CRYPTOGRAPHY WAS
15 DISCLOSED THERE.

16 AND IT WAS DISCLOSED IN A PUBLICATION WHICH THE
17 INVENTORS AND CYLINK THEMSELVES HAD SAID DIDN'T REALLY
18 HAVE ANY ENABLING CONTENT, DIDN'T REALLY DESCRIBE ANYTHING
19 BUT A CONCEPT, DIDN'T REALLY DESCRIBE ANYTHING BUT A
20 FUNCTIONAL RESULT.

21 AND IF IT WAS A FUNCTIONAL RESULT WHEN
22 DESCRIBED, WHEN USED IN MULTIUSER IN 1975, THAT SAME
23 LANGUAGE IN THE PATENT REMAINS AS FUNCTIONAL AND
24 INDEFINITE THERE.

25 JUST NOTE IN EXHIBIT 1001, WE CAN FIND ALMOST

1 THE SAME GENERAL DESCRIPTION AS WE DO IN 1(C).

2 ON PAGE 110 OF EXHIBIT 1001, "WE'RE TOLD THE
3 GENERATION OF THIS E-D," THOSE BEING THE ENCIPHERING AND
4 DECIPHERING KEYS, "IS BEST DONE AT THE USER'S TERMINAL."

5 SO WE'RE GENERATING THIS PAIR THAT ARE GOING TO
6 HAVE SOME FUNCTIONAL RELATIONSHIP. "THE USER THEN KEEPS
7 THE DECIPHERING KEY D SECRET," SECRET KEY, "AND MAKES THE
8 ENCIPHERING KEY E PUBLIC," A NOTE HE SAYS BY PLACING IT IN
9 A CENTRAL FILE ALONG WITH HIS NAME AND ADDRESS, WHICH, I
10 THINK, IS AUTHENTICATION AND IDENTIFICATION BY ANY OTHER
11 NAME.

12 BUT WE HAVE THERE THE GENERAL CONCEPT OF
13 FUNCTIONAL DESCRIPTION OF GENERATING A SECRET AND A PUBLIC
14 KEY, AND THAT THE SECRET AND THE PUBLIC KEY WILL HAVE SOME
15 FUNCTIONAL RELATIONSHIP.

16 AND IN THE PARAGRAPH ABOVE THAT, ON PAGE 110,
17 WE'RE TOLD THAT: ALTHOUGH D IS DETERMINED FROM E, IT IS
18 INFEASIBLE TO COMPUTE D, THE PRIVATE KEY FROM THE PUBLIC
19 KEY.

20 SO WE HAVE THE GENERATION OF A KEY PAIR; WE HAVE
21 THE COMPUTATIONAL INFEASIBILITY; WE HAVE EVERYTHING THAT
22 IS SET FORTH HERE; AND YET, AS THEY ADMIT, WE HAVE NO
23 CONTENT.

24 THIS IS SIMPLY A FUNCTIONAL DESCRIPTION OF THE
25 PARADIGM OF PUBLIC KEY CRYPTOGRAPHY, AND IT RUNS FLATLY

1 AFOUL OF THE CONCEPTS I THINK OF RAYTHEON, THE CONCEPTS
2 ANIMATING 112, PARAGRAPH SIX, THE MORSE CASE, THE HYATT
3 CASE, TO SAY THAT WITH THIS KIND OF FUNCTIONAL
4 DESCRIPTION, YOU CAN PATENT THE FUTURE.

5 AND THIS IS NOT AN ISSUE OF SAYING -- I CAN GO
6 TO ANY DICTIONARY. YOU WON'T GET THE SAME MEANING TO ALL
7 OF THESE WORDS. NOT EVEN THEIR DICTIONARIES ALL HAD THE
8 SAME MEANINGS. THEY ARE ALL VARIATIONS.

9 AND PROFESSOR KONHEIM SAID, "IT ISN'T A MATTER
10 THAT 'GENERATING' IS SOME RUSSIAN WORD THAT I DON'T
11 UNDERSTAND; I UNDERSTAND IT, BUT IT STILL DOESN'T GIVE ME
12 ANY CONTENT." I THINK HE EVEN SAID, "IT IS TOO INDEFINITE
13 TO TELL ME HOW TO BRING ABOUT THIS RESULT."

14 AND I WON'T BELABOR THE POINT, BUT I THINK WHEN
15 YOU GO TO 1(E), WITH THE PROCESSING THE MESSAGE AND THE
16 ENCIPHERING KEY AT THE TRANSMITTER, AND THEN GENERATING AN
17 ENCIPHERED MESSAGE, YOU'RE DOING SOMETHING DIFFERENT DOWN
18 HERE THAN GENERATING AN ENCIPHERED MESSAGE THAN YOU'RE
19 DOING GENERATING UP HERE THE SECRET KEY PAIR.

20 BUT YOU WON'T FIND OUT IN THIS CLAIM LANGUAGE
21 WHAT THAT DIFFERENCE IS. YOU STILL HAVE SIMPLY A BROAD
22 FUNCTIONAL RELATIONSHIP THAT THE ENCIPHERING
23 TRANSFORMATION IS EASY TO EFFECT BUT COMPUTATIONALLY
24 INFEASIBLE TO INVERT.

25 SO WE'RE TOLD THERE IS SOME RESULT THAT WE WANT

1 TO BRING ABOUT, AND OBVIOUSLY WE KNOW THAT THERE IS SOME
2 ACT THAT WE ARE SUPPOSED TO DO. BUT 112, PARAGRAPH SIX,
3 SAYS: YOU EITHER SET FORTH THE ACT WITH ENOUGH
4 SPECIFICITY TO AVOID THE INDEFINITENESS PROBLEM IN THE
5 CLAIM, OR YOU ARE ONLY SAVED FROM INDEFINITENESS BY GOING
6 TO THE STATUTE, BY GOING TO THE SPECIFICATION.

7 AND I WOULD NOTE THAT THE RAYTHEON CASE --
8 AGAIN, I DON'T MEAN TO BELABOR, AND I'M NOT SUGGESTING
9 THAT THE WORDS "SUCH THAT" ARE MAGIC WORDS, THAT I CAN
10 POINT TO THE "SUCH THAT" AND GO HOME. LIKEWISE, I DON'T
11 THINK THAT THEY CAN POINT TO THE "SUCH THAT" AND SAY I'M
12 NOT THERE.

13 BUT THE RAYTHEON DID SAY EXPRESSLY, AND
14 REAFFIRMING GREENBERG, THAT THE FUNCTIONAL LANGUAGE
15 INTRODUCED AFTER "SO THAT" MEANT THAT THE CLAIM SHOULD BE
16 CONSTRUED ACCORDING TO 112, PARAGRAPH SIX.

17 AND THERE IS NOT SUFFICIENT CONTENT, THERE IS
18 NOT SUFFICIENT SPECIFICITY, OR, IN THE WORDS OF GREENBERG,
19 FROM PROFESSOR KONHEIM, THERE IS NO WELL-UNDERSTOOD
20 MEANING IN THE ART OF WHAT IS "PROCESSING," "GENERATING,"
21 WHEN YOU'RE TALKING ABOUT PROCESSING THE MESSAGE AND THE
22 PUBLIC ENCIPHERING KEY, OR GENERATING AN ENCIPHERED
23 MESSAGE, WHICH DIFFERENTIATES WHAT YOU'RE DOING HERE WITH
24 GENERATING AN ENCIPHERED MESSAGE FROM WHAT YOU'RE DOING UP
25 HERE WHEN GENERATING FROM SAID RANDOM NUMBERS, OR, IN THE

1 OTHER CLAIM ELEMENTS, GENERATING RANDOM INFORMATION OR
2 GENERATING A PUBLIC KEY. THEY'RE ALL DIFFERENT.

3 BUT YOU CAN'T TELL FROM THE CLAIM LANGUAGE HOW
4 DIFFERENT, OR, MORE IMPORTANTLY, WHAT IT IS THAT YOU'RE
5 SUPPOSED TO DO TO BRING ABOUT THAT DESIRED RESULT.

6 NOW, GREENBERG AND RAYTHEON ARE NOT THE ONLY
7 CASES WHICH I THINK SUPPORT THE PROPOSITION. AS I NOTED
8 IN THE GREENBERG CASE, THE FEDERAL CIRCUIT EXPRESSLY
9 APPROVED OF THE PATENT OFFICE GUIDELINES, WHICH WERE
10 PUBLISHED A YEAR OR SO AGO, DEALING WITH 35 U.S.C. 112,
11 PARAGRAPH SIX.

12 AND IN THAT CASE, THE PATENT OFFICE SPECIFICALLY
13 SAID THAT THERE ARE NO MAGIC WORDS AND WE DON'T LOOK FOR
14 MAGIC WORDS. THE TEST IS: IS IT SET FORTH IN
15 SUFFICIENTLY FUNCTIONAL LANGUAGE THAT THE ONLY WAY TO SAVE
16 THE CLAIM IS TO GO TO THE SPECIFICATION?

17 AND THE PATENT OFFICE GUIDELINES CITE, FOR
18 SUPPORT, TWO CASES, APPLICATION OF ROBERTS, AND EX PARTE
19 ZIMMERLEY.

20 AND I THINK IT IS WORTH SPENDING A LITTLE TIME,
21 BECAUSE I THINK THE TREATMENT OF THESE CASES IN CYLINK'S
22 BRIEF IS SOMEWHAT INCORRECT, OR TOO NARROW A READING, TO
23 BE GENEROUS.

24 THEY STATE IN THEIR BRIEF THAT NEITHER OF THESE
25 CASES DEALT WITH 112, PARAGRAPH SIX. AND IN THAT, THEY

1 ARE LITERALLY CORRECT, BECAUSE THE STATUTE AT THAT TIME
2 HAD THE LANGUAGE THAT'S NOW IN PARAGRAPH SIX IN PARAGRAPH
3 THREE.

4 BUT THE CASES DEALT WITH PARAGRAPH THREE. AND
5 THE CASES DEALT WITH WHETHER THESE SHOULD BE MEANS PLUS
6 FUNCTION CLAIMS OR NOT.

7 FOR EXAMPLE, IN APPLICATION OF ROBERTS, WHICH IS
8 470 F.2D 1399, ON PAGE 1402, WHAT WAS THEN THE COURT OF
9 CUSTOMS AND PATENT APPEALS -- THIS IS A 1973 DECISION:
10 "WE HAVE ALSO CONCLUDED THAT THE BOARD'S OTHER VIEWS OF
11 THE CLAIMS UNDER SECTION 112 ARE NOT WELL TAKEN. THE
12 THIRD PARAGRAPH OF THAT SECTION SPECIFICALLY ALLOWS THE
13 USE OF FUNCTIONAL LANGUAGE TO DEFINE CLAIM LIMITATIONS."

14 AND THEN IT GOES ON WITH A LENGTHY QUOTE FROM
15 ANOTHER COURT. AND THEN IT GOES ON, ON PAGE 1403, IN
16 ADDRESSING LANGUAGE WHICH SAID: "REDUCING THE COEFFICIENT
17 OF FRICTION IS NOT A STEP AT THE RESULT OF AN UNSTATED
18 STEP."

19 THE FACT IS THAT BOTH IN ROBERTS AND IN
20 ZIMMERLEY, THE COURT WAS LOOKING AT LANGUAGE WHICH, I
21 WOULD SUBMIT, THAT, WHEN UPON REFLECTION, IS AS BROAD AND
22 FUNCTIONAL AS THE LANGUAGE HERE. AND THE COURTS IN
23 ZIMMERLEY AND ROBERTS CAME TO THE CONCLUSION THAT THEY
24 WERE SUBJECT TO 112.6, NOTWITHSTANDING, IN ROBERTS, THAT
25 THE CLAIM, I BELIEVE, DID NOT HAVE "STEP" OR "MEANS," AND

1 I DON'T BELIEVE HAD "SUCH THAT" OR "SO THAT" IN IT.

2 I THINK THE CLAIM, CLAIM 5, READ:

3 "THE METHOD OF CORRUGATING POLYETHYLENE
4 TEREPHTHALATE FILM WHICH COMPRISES SHAPING SAID
5 FILM AT A TEMPERATURE IN THE RANGE OF ABOUT 100
6 DEGREES TO 175 DEGREES BY PRESSING SAID FILM
7 BETWEEN TWO COACTING ROTATING SURFACES AND
8 REDUCING THE COEFFICIENT OF FRICTION OF THE
9 RESULTING FILM TO BELOW ABOUT 0.40 AS DETERMINED
10 BY THE BELL TEST."

11 THE LANGUAGE THE COURT WAS TALKING ABOUT WAS
12 REDUCING THE COEFFICIENT OF FRICTION, NOT INTRODUCED BY
13 "SUCH THAT," NOT INTRODUCED BY "SO THAT," NOT INTRODUCED
14 BY "MEANS FOR," NOT INTRODUCED BY "STEPS FOR."

15 BUT NONETHELESS, THE COURT HELD, BROUGHT FORWARD
16 IN THE PATENT OFFICE GUIDELINES, AND I THINK APPROVED BY
17 THE FEDERAL CIRCUIT IN GREENBERG, THAT WHEN YOU LOOK AT
18 THE LANGUAGE OF THE CLAIM, NOT THE SEMANTIC SEARCH FOR
19 DICTIONARY DEFINITIONS, BUT WHEN YOU LOOK AT THE WORDS OF
20 THE CLAIM, DO THEY SWEEP TOO BROADLY AND TOO INDEFINITELY,
21 AND THEY ARE, THEREFORE, FUNCTIONAL, WHICH CAN ONLY BE
22 SAVED UNDER 112, PARAGRAPH SIX.

23 NOW I'D LIKE TO JUST BRIEFLY ADDRESS THE
24 DEFENDANTS' APPENDICES.

25 IN THEIR BRIEF AT ONE POINT, DEFENDANTS STATE

1 THAT THE -- I BELIEVE IT'S AT THEIR REPLY BRIEF, OR
2 RESPONSE BRIEF -- OR I GUESS IT'S THEIR SUPPLEMENTAL --
3 THEIR NEW SUPPLEMENTAL BRIEF, THE LAST ONE THEY FILED, AT
4 LEAST AS OF NOON TODAY -- AT, I THINK, PAGE FOUR, LINES
5 FOUR TO 11, STATE IN THE COURT THAT THE FEDERAL CIRCUIT
6 HAS REPEATEDLY FOUND THAT CLAIMS LIKE THESE AT ISSUE DO
7 NOT INVOKE SECTION 112, PARAGRAPH SIX.

8 NOW, I MUST ADMIT THAT WHEN I SAW THE BRIEFS
9 COME IN AND SAW THESE APPENDICES THERE, I THOUGHT I HAD A
10 PRETTY GOOD GRIP ON THE LAW, AND I WAS SOMEWHAT CONCERNED.
11 AND IT STRUCK ME THAT MAYBE THEY HAD A BETTER LIBRARY THAN
12 OURS.

13 BUT I THOUGHT TO MYSELF, GOING INTO THE
14 RESEARCH, THAT I WOULD BE WILLING TO BET THAT IN NONE OF
15 THOSE CASES WAS THE COURT PRESENTED WITH THE ISSUE THAT IS
16 BEFORE YOU TODAY. AND THAT IS: DID ANYONE RAISE THE
17 ARGUMENT, DID ANYONE HAVE CLAIMS WHICH WERE SO BROAD AS
18 THESE, THAT IT WOULD HAVE CALLED FOR THIS ARGUMENT? WAS
19 IT EVER PRESENTED?

20 AND THE ANSWER IS: NO. NOT ONE OF THE CASES
21 THEY'VE CITED TO YOU WAS THE COURT EVER SQUARELY PRESENTED
22 WITH THE ISSUE: IS A CLAIM LIKE THIS SUBJECT TO 35 U.S.C.
23 112.6. AND THE COURT, IN ANY KIND OF ANALYSIS, LET ALONE
24 A REASONED ANALYSIS, SAID, NO, IT ISN'T.

25 IN MANY OF THOSE CASES, THE CLAIMS THAT THEY

1 POINT TO WEREN'T EVEN THE SUBJECT OF DISCUSSION. AND
2 THAT'S LIKE GOING INTO A CASE AND FINDING IN THE FACTUAL
3 BACKGROUND A CASE THAT'S SIMILAR TO YOURS, EVEN THOUGH IT
4 GOES OFF ON A TOTALLY DIFFERENT ISSUE, AND SAY: HERE IS A
5 CASE IN WHICH THE SAME FACTS WERE THERE AND THEY DIDN'T
6 COME TO THE SAME RESULT. I DON'T THINK IT'S PARTICULARLY
7 HELPFUL. THE COURT'S OBVIOUSLY THE ONE THAT'S GOING TO
8 MAKE ITS DECISION ON THAT.

9 I WOULD ALSO COMMEND TO THE COURT THE FACT THAT
10 WHEN YOU LOOK AT MANY OF THOSE CLAIMS, EVEN THOSE WHICH
11 HAD THE WORDS "SUCH THAT" IN THEM, THAT THEY DID NOT HAVE
12 THE SAME PROBLEM THAT WE HAVE HERE. THERE WAS CONTENT, AS
13 TO IN THE CLAIM ITSELF, AS TO WHAT IT WAS YOU WERE DOING
14 TO TRY TO BRING ABOUT THE RESULT.

15 AND THAT'S WHY I SAID -- AND I COME BACK
16 REASONABLY CLOSE HERE, I GUESS, TO MY CLOSE -- THAT THIS
17 IS NOT A SEMANTIC GAME. THIS IS A GAME LOOKING FOR THE
18 SUBSTANCE OF WHAT IT IS THAT THE PATENT SYSTEM IS ABOUT,
19 AND THE SUBSTANCE OF WHAT IT IS THEY TRIED TO PATENT.

20 AND THAT'S WHY THE LINE MAY NOT BE A BRIGHT
21 LINE, AND THAT'S WHY MAGIC WORDS AND DICTIONARIES ARE ONLY
22 OF LIMITED HELP, BECAUSE HERE, AFTER YOU'VE RESORTED TO
23 ALL THE DICTIONARIES, AND AFTER YOU'VE GONE THROUGH ALL OF
24 THE -- AND I CAN'T TELL WHETHER THEY CALL IT DICTIONARY
25 INTRINSIC OR EXTRINSIC OR WHATEVER, BUT WHEN YOU GO TO ALL

1 THE EVIDENCE THAT THEY SAY IS PROPER AND YOU THROW OUT ALL
2 THE EVIDENCE THAT THEY SAY IS IMPROPER, YOU'RE STILL LEFT
3 WITH THE FACT THAT WHEN I PLUG IN ALL THE DEFINITIONS THAT
4 SAY "GENERATING MEANS OBTAINING," "OBTAINING" DOESN'T TELL
5 ME ANYTHING MORE THAN "GENERATING" DOES.

6 "PROCESSING" -- AND I DON'T EVEN KNOW WHAT THEIR
7 DEFINITION IS -- BUT "PROCESSING" DOESN'T TELL YOU
8 ANYTHING, EITHER. GENERATING DOWN HERE THE ENCIPHERED
9 MESSAGE, OBTAINING THE MESSAGE, DEVELOPING THE CIPHERED
10 MESSAGE, CREATING THE MESSAGE, THEY STILL WON'T SOLVE THE
11 PROBLEM THAT 112.6 IS ALL ABOUT.

12 THE POINT OF NOVELTY, IF I CAN USE A WORD THAT
13 THE SUPREME COURT USED, I THINK, IN HALLIBURTON, THE
14 ADVICE HERE IS THAT THE PRECISE POINT OF NOVELTY, THE
15 PRECISE THING THAT THEY ARGUE DISTINGUISHED THE PRIOR ART,
16 WHICH IS: WE HAVE COME UP WITH WHAT WE BELIEVE IS A
17 WORKABLE SYSTEM, IS ALL BURIED HERE IN THE "SUCH THAT," IN
18 BOTH PLACES.

19 THE CRITICAL CONCEPTS OF THIS SYSTEM ARE: YOU
20 HAVE TO PROTECT TWO AREAS. ONE, YOU CAN'T COMPROMISE THE
21 PRIVATE KEY FROM THE PUBLIC KEY; AND ONE, (E) HERE, WHICH
22 IS, I THINK, A REQUIREMENT OF ANY SYSTEM, THAT SOMEBODY
23 WHO HAS THE ENCIPHERED MESSAGE CAN'T DETERMINE WHAT THE
24 MESSAGE IS.

25 BUT (E) IS A GENERAL DESCRIPTION OF ANY

1 CRYPTOSYSTEM. YOU HAVE TO BE ABLE TO PROTECT DECIPHERED
2 TEXT FROM BEING COMPROMISED AND FROM GOING THROUGH THE
3 DECIPHERED TEXT AND THE PLAIN TEXT, BUT THIS DOESN'T TELL
4 YOU ANYTHING ABOUT HOW TO DO IT.

5 I THINK ON THE APPLICATION OF 112, PARAGRAPH
6 SIX, THAT THAT IS PRETTY MUCH IT IN A NUTSHELL. THE COURT
7 IS FACED WITH A DIFFICULT TASK, ALTHOUGH I WOULD ARGUE
8 THAT IT IS NOT THAT DIFFICULT WHEN ONE RECOGNIZES WHAT IT
9 IS. IT'S SUPPOSED TO ANIMATE THE PATENT STATUTES.

10 BUT THIS IS A CLAIM WHICH TRULY HAS NO BOUNDS,
11 IS TRULY INDEFINITE, AND TRULY PRESENTS PROBLEMS FOR
12 ANYBODY AFTER THE FACT, WHICH, FROM GOING BACK HERE AND
13 TRYING TO DETERMINE WHERE ARE THE METES AND BOUNDS OF THIS
14 CLAIM. AND I DON'T THINK YOU'LL FIND THEM THERE.

15 IF I COULD, I'D LIKE TO ADDRESS BRIEFLY NOW AND
16 SWITCH TO A RELATED TOPIC, BUT IT DEALS WITH CLAIM 6, AND
17 THAT IS: THE PARTIES ARE ATTEMPTING TO STIPULATE TO WHAT
18 IT IS IN THE SPECIFICATION THAT CORRESPONDS TO THE VARIOUS
19 MEANS SHOWN HERE. AND THE PARTIES ARE TRYING TO IDENTIFY
20 WHAT ACTS CARRY OUT THESE CLAIM ELEMENTS, DEPENDING ON
21 WHAT THE COURT'S DECISION IS. BUT I WANT TO FOCUS HERE ON
22 CLAIM 6.

23 AS I SAID, THERE IS NO DISPUTE THAT THESE ARE
24 MEANS FOR CLAIMS. THERE IS A DISPUTE, HOWEVER, AS TO WHAT
25 THAT MEANS ONCE YOU'VE IDENTIFIED WHAT THE STRUCTURAL

1 ELEMENTS IN THE PATENT ARE FOR PERFORMING THE FUNCTION.
2 AND I THOUGHT THERE WAS REALLY NOT MUCH ROOM FOR A
3 DISPUTE.

4 FOR EXAMPLE, IF YOU LOOKED AT THE MEANS FOR
5 GENERATING THE PUBLIC ENCIPHERING KEY AND THE MEANS FOR
6 GENERATING THE SECRET DECIPHERING KEY OF WHAT THE PATENT
7 CALLS THE SECOND EMBODIMENT, WHICH IS THE MULTIPLICATIVE
8 KNAPSACK, IT'S SHOWN IN FIGURE 11 OF THE PATENT. AND IT
9 IS DESCRIBED IN THE SPECIFICATION.

10 I WOULD HAVE THOUGHT THERE WAS NO DISPUTE THAT
11 WHEN ONE LOOKED AT FIGURE 11 AND YOU SAW THESE VARIOUS
12 GENERIC BLOCK ELEMENTS CONFIGURED AS THEY ARE, THAT THE
13 FAIR APPLICATION OF 112, PARAGRAPH SIX, WOULD BE THAT THE
14 MEANS, IN THAT EMBODIMENT, FOR GENERATING THE PUBLIC
15 ENCIPHERING KEY AND THE SECRET DECIPHERING KEY, ARE THOSE
16 ELEMENTS CONFIGURED TO PERFORM THOSE OPERATIONS. IN OTHER
17 WORDS, IT IS AN EXPONENTIATOR AND A MULTIPLIER AND THE
18 PRIME TERRITORY, AND ALL THE CONTENT OF THAT, HOOKED UP IN
19 THAT PARTICULAR WAY TO BRING ABOUT THAT PARTICULAR
20 FUNCTION.

21 AND AS PROFESSOR HELLMAN SAID IN HIS TUTORIAL,
22 SOME THINGS ARE COMMUTATIVE AND OTHERS AREN'T. BUT I
23 BELIEVE WHAT WE HAVE FROM, AS I UNDERSTAND DEFENDANTS'
24 POSITION, IT IS THAT THESE ARE GENERIC STRUCTURAL CIRCUIT
25 ELEMENTS. AN ADDER AND A MULTIPLIER AND AN EXPONENTIATOR,

1 AND THEY REALLY CAN BE CONFIGURED IN ANY PARTICULAR WAY,
2 FOR PURPOSES OF THIS CLAIM; AND, THEREFORE, THE COURT
3 SHOULDN'T FIND THAT THE ELEMENTS OF FIGURE 11 ARE THOSE
4 CONFIGURED TO PERFORM THE OPERATION SET FORTH HERE, BUT
5 THAT THE COURT SHOULD SIMPLY CONSTRUE THAT THE MEANS FOR
6 CLAIM 6 IS A GENERIC SET OF CIRCUIT ELEMENTS, WHICH COULD
7 BE THOSE SHOWN HERE.

8 AND THE SIGNIFICANCE OF THAT IS NOT NOW, BUT FOR
9 HOW THEY ARE GOING TO TRY TO ARGUE LATER ON THEIR BURDEN
10 OF TRYING TO PROVE THAT THE RSA, WHICH IS A VASTLY
11 DIFFERENT SYSTEM, IS NONETHELESS EQUIVALENT.

12 BUT THE FACT OF THE MATTER IS: IF YOU TREAT
13 THESE AS GENERIC INTERCHANGEABLE CIRCUIT ELEMENTS, YOU
14 WON'T GET WHAT THE PATENT DESCRIBES AS THE MULTIPLICATIVE
15 KNAPSACK. IF YOU INTERCHANGE, FOR EXAMPLE, THE ADDER AND
16 THE MULTIPLIER IN FIGURE 11, YOU WILL NOT END UP WITH AN
17 M, THE MODULUS, THE A PRIMES, WHICH ARE THE KNAPSACK
18 NUMBERS IN THE EASY-TO-SOLVE KNAPSACK, OR THE B FROM THE
19 KEY SOURCE THAT IS DESCRIBED IN THE PATENT. YOU'LL END UP
20 WITH SOMETHING ELSE. WHATEVER IT IS, I DON'T KNOW. BUT
21 YOU WON'T END UP WITH THE VARIOUS CONSTRAINTS ON THOSE
22 NUMBERS WHICH THE PATENT DESCRIBES.

23 SO THE WHOLE IMPORT OF MR. DUSSE'S TESTIMONY
24 YESTERDAY WAS TO SAY THAT, YES, THESE CIRCUIT ELEMENTS MAY
25 BE, IN A SENSE, GENERIC; BUT AS SHOWN IN THE PATENT FOR

1 PERFORMING THESE MEANS, THEY ARE CONFIGURED IN A
2 PARTICULAR WAY TO PERFORM A PARTICULAR FUNCTION.

3 AND I THINK THAT THE DIFFERENCE WE'RE ARGUING
4 ABOUT HERE IS ILLUSTRATED WHEN ONE LOOKS AT FIGURES 5 AND
5 6. THOSE TWO CIRCUITS HAVE THE SAME STRUCTURAL ELEMENTS,
6 TWO AND GATES, TWO EXCLUSIVE OR GATES -- THOSE ARE THE X
7 OR GATES -- A DELAY CIRCUIT, AND AN OR GATE. BUT
8 CONFIGURED IN FIGURE 4, THEY PERFORM ONE FUNCTION. AND
9 CONFIGURED IN FIGURE 6, THEY PERFORM ANOTHER FUNCTION. ,
10 AND YOU CAN'T CONSIDER, THEREFORE, THESE CIRCUIT ELEMENTS
11 WITHOUT CONSIDERING THE FUNCTION THAT THEY ARE CONFIGURED
12 TO PERFORM.

13 AND A FAIR APPLICATION OF 112, PARAGRAPH SIX,
14 IS: WHEN YOU GO TO THE SPECIFICATION TO DETERMINE THE
15 MEANS OF GENERATING THE PUBLIC KEY AND THE MEANS FOR
16 GENERATING THE SECRET DECIPHERING KEY, ONE, TO BE FAITHFUL
17 TO THAT, HAS TO GO TO THE SPECIFICATION, SEE WHAT IT
18 DESCRIBES AS THE FUNCTION THAT'S BEING PERFORMED, AND THEN
19 TO SEE THE CIRCUITRY AND THE CIRCUIT ELEMENTS THAT PERFORM
20 THAT FUNCTION.

21 AND THE CIRCUITRY HERE, THE STRUCTURE THAT
22 PERFORMS THE FUNCTION, IS NOT THOSE GENERIC LOOSE-CIRCUIT
23 ELEMENTS; IT IS THE STRUCTURE OF FIGURE 11. THAT IS THE
24 MEANS FOR GENERATING, FOR EXAMPLE, THE SECRET DECIPHERING
25 KEY. AND AT THE BOTTOM, IN BOX 136, THAT IS THE MEANS FOR

1 GENERATING THE PUBLIC ENCIPHERING KEY.

2 IT IS NOT FAIR TO SAY THAT THE MEANS FOR
3 GENERATING A SECRET DECIPHERING KEY IS SIMPLY AN
4 EXPONENTIATOR, A MULTIPLIER, AN ADDER, AND A PRIME TESTER
5 IN A TABLE OF PRIMES, BECAUSE YOU CAN CONFIGURE THOSE TO
6 COME UP WITH ANY NUMBER, I ASSUME, OF FUNCTIONS. BUT
7 HERE, IT IS THAT COMBINATION OF ELEMENTS, CONFIGURED IN
8 THAT PARTICULAR WAY, TO ACCOMPLISH THAT FUNCTION, WHICH IS
9 WHAT THE STATUTE SPEAKS TO.

10 AND I THINK THE ONLY TESTIMONY BEFORE THE COURT
11 ON THAT IS THAT YOU HEARD FROM MR. DUSSE, WHICH IS: WHEN
12 HE GOES, AS A PERSON KNOWLEDGEABLE ABOUT HARDWARE DESIGN
13 AND CIRCUIT DESIGN, AND HE LOOKS AT THIS SPECIFICATION, AS
14 TO HOW YOU PERFORM THE VARIOUS FUNCTIONS STATED THERE, YOU
15 FIND AND ARE LED TO THESE CIRCUIT ELEMENTS, CONFIGURED AS
16 THEY ARE SHOWN, TO PERFORM THOSE FUNCTIONS.

17 UNLESS THE COURT HAS ANY QUESTIONS, THAT
18 CONCLUDES MY COMMENTS ON 112, PARAGRAPH SIX.

19 THE COURT: VERY WELL, SIR.

20 MR. KENNEDY?

21 MR. KENNEDY: MAY IT PLEASE THE COURT, STARTING
22 WITH MR. HASLAM'S LAST POINTS, REGARDING CLAIM NUMBER SIX,
23 AS HE INDICATED, THE PARTIES HAVE BEEN IN NEGOTIATION TO
24 TRY TO WORK OUT A STIPULATION IN THAT REGARD. MR. KRAMER
25 HAS BEEN A MEMBER OF OUR TEAM THAT'S BEEN INVOLVED IN THAT

1 PHASE OF THINGS, AND TO THE EXTENT, IF ANY, THAT THE COURT
2 WISHES TO HEAR THE CYLINK SIDE OF THE CLAIM 6 OR GATES OR
3 WHATEVER IT IS, I'LL HAVE TO DEFER TO MR. KRAMER ON THAT
4 ONE. I AM, HOWEVER, PREPARED TO ADDRESS THE STEP PLUS
5 FUNCTION ARGUMENT THAT CONSTITUTED THE BULK OF WHAT
6 MR. HASLAM HAD TO SAY.

7 AS HE WAS SPEAKING, I FOUND MYSELF REPEATEDLY
8 LOOKING AT MY WRISTWATCH. THAT'S NOT BECAUSE I THOUGHT HE
9 WAS TAKING TOO MUCH TIME. BUT I HAVE A CALENDAR WATCH,
10 AND I WANTED TO MAKE SURE THAT IT WAS STILL OCTOBER 2ND
11 AND NOT OCTOBER 30TH, BECAUSE THAT WAS THE DAY THAT THE
12 VALIDITY HEARING WAS SUPPOSED TO BE ARGUED.

13 AND GOING FROM THE MORSE CASE ON, WE HEARD A LOT
14 OF REASONS AS TO WHY MR. HASLAM THINKS THIS COURT SHOULD
15 FIND CLAIMS, AT LEAST ONE, AND OTHERS, TO BE INVALID.
16 THAT, OF COURSE, IS NOT THE ISSUE BEFORE THE COURT TODAY.
17 AND ON OCTOBER 30TH, WE WILL BE PREPARED TO ADDRESS
18 VALIDITY.

19 AND AT THAT TIME, WE'LL BE SHOWING THE COURT
20 THAT THE PATENT OFFICE DID ALL THOSE THINGS THAT
21 MR. HASLAM SAID COULDN'T HAPPEN WHEN THEY FOUND THAT THIS
22 WAS A VALID PATENT, BECAUSE, OF COURSE, AT THE TIME THAT
23 THIS PATENT WAS APPLIED FOR, A SEPARATE 112.6 ANALYSIS
24 WASN'T APPLIED. THAT DIDN'T COME INTO PLAY UNTIL 1994.
25 SO THIS WAS FOUND TO BE A VALID, FUNCTIONING PATENT UNDER

1 THE OLD SECTION 2 STANDARD.

2 AND WE'RE GOING TO GO FURTHER. WE'RE GOING TO
3 SHOW THAT THIS IS ONE OF THOSE RELATIVELY RARE PIONEERING
4 PATENTS THAT REALLY REPRESENTED A BREAKTHROUGH, AND THAT
5 PUBLIC KEY CRYPTOLOGY, LIKE FLYING, WAS SOMETHING PEOPLE
6 HAD DREAMED ABOUT FOR A LONG TIME, BUT IT TOOK MERKLE AND
7 PROFESSOR HELLMAN TO ACTUALLY GET A WORKING EMBODIMENT.

8 THEY GOT THE KITTY HAWK, AND THEY GOT IT OFF THE
9 GROUND, AND TO BE SURE, AS WITH AIRPLANES, THERE HAVE BEEN
10 A LOT OF IMPROVEMENTS ON THE KITTY HAWK SINCE, BUT WE'LL
11 BE SHOWING YOU THEY HAD THE PIONEERING PATENT AND THE
12 FIRST ENABLEMENT.

13 I THINK THE KEY STARTING POINT IS TO REMEMBER
14 THAT SECTION 112.6 PROVIDES THE PATENTEE WITH AN OPTION.
15 IT'S THE PATENTEE'S PREROGATIVE TO DECIDE WHETHER HE OR
16 SHE WANTS TO EXPRESS A CLAIM IN SECTION 112 FORM. AND AS
17 WE'RE TOLD, ORDINARILY, WHEN A PATENT HOLDER WANTS TO DO
18 THAT, WHEN THEY HAVE COMPETENT PATENT COUNSEL, THEY KNOW
19 EXACTLY HOW TO DO SO. THEY SAY STEP FOUR.

20 AND HERE, IF I MIGHT PUT UP -- MS. GOLD CAN HELP
21 ME GET CLAIM 1 UP. AND IN FACT, WE CAN PUT IT RIGHT NEXT
22 TO CLAIM 6 SO WE CAN GET THE EASELS ADJACENT TO EACH
23 OTHER. I THINK THAT MIGHT HELP.

24 IN THIS CASE, OF COURSE, IT'S UNDISPUTED THAT
25 CLAIM 1 NOWHERE USES THE PREFERRED LANGUAGE OF "STEPS

1 FOR." IN FACT, CLAIM 1 NOWHERE EVEN USES THE WORD
2 "STEPS."

3 AND TO BE SURE, AS MR. HASLAM HAS POINTED OUT,
4 THAT'S NOT THE END OF THE ANALYSIS. THE NEXT STEP IS TO
5 LOOK THROUGH THE PROSECUTION HISTORY AND TO SEE IF THERE
6 IS ANY OBJECTIVE EVIDENCE THAT THE PATENT HOLDER, IN THE
7 COURSE OF PROSECUTING THE PATENT, INDICATED AN INTENT TO
8 EXERCISE 112.6.

9 AND, AGAIN, THERE IS NO DISPUTE, AND WE HEARD
10 NOTHING FROM HASLAM THAT THERE IS A SINGLE WORD IN THE
11 FILE WRAPPER THAT SUGGESTS THAT.

12 FOR EXAMPLE, THERE WAS NEVER A POINT WHERE, IN
13 RESPONSE TO A REJECTION, HELLMAN CAME BACK AND SAID: "NO,
14 NO, I CAN GET AROUND THE PRIOR ART ON THE BASIS OF SOME
15 UNIQUE CHARACTERISTIC OF THE TRAP DOOR KNAPSACK." THAT
16 SIMPLY NEVER HAPPENED.

17 NOW, IN ADDITION TO NOT HAVING THE WORDS "STEPS
18 FOR" IN CLAIM 1, AND IN ADDITION TO NOT HAVING ANY
19 OBJECTIVE EVIDENCE ANYWHERE IN THE PROSECUTION HISTORY, WE
20 HAVE THE FURTHER RULE THAT, IN A PATENT WITH MULTIPLE
21 CLAIMS, EACH CLAIM IS PRESUMED TO BE DIFFERENT. AND WE
22 CITED THE UNIROYAL VERSUS RUDKIN, R-U-D-K-I-N, CASE FOR
23 THAT, 837 F.2D 1044, AT 1054-55.

24 AND THAT'S THE REASON WE'VE PUT CLAIM 6 UP, YOUR
25 HONOR, SINCE WE HAVE BOTH A DIFFERENT CLAIM, AND, IN CLAIM

1 6, AN OBVIOUS EXAMPLE OF THE PATENT HOLDER'S INTENT AND
2 DESIRE TO EXERCISE THE 112.6 OPTION. CLAIM 6 IS
3 UNQUESTIONABLY A MEANS OR "STEP FOR" CLAIM, NO QUESTION
4 ABOUT IT.

5 SO IN ORDER TO ACCEPT RSA'S ARGUMENT AND BE
6 CONSISTENT WITH THE IDEA THAT ONE MEANS GO SOMETHING
7 DIFFERENT THAN SIX, THE COURT'S FACED WITH THE CHALLENGE
8 OF: HOW AM I GOING TO READ THE WORDS "STEPS FOR" INTO
9 CLAIM 1 WITHOUT ENDING UP WITH SOMETHING THAT'S AN EXACT
10 DUPLICATION OF CLAIM 6? AND TO THAT, I SUBMIT, THERE IS
11 NO GOOD ANSWER.

12 SO TWO POINTS. ONE, NO INDICATION ON THE CLAIM
13 ITSELF, OR ANYWHERE IN THE PROSECUTION HISTORY, THAT
14 MR. HELLMAN INTENDED TO EXERCISE HIS 112.6 OPTION; AND, IN
15 ADDITION TO THAT, WE HAVE ABUNDANT EVIDENCE IN CLAIM 6 AND
16 ELSEWHERE THAT MR. HELLMAN AND HIS PATENT COUNSEL KNEW HOW
17 TO EXERCISE THAT OPTION WHEN THEY WANTED TO DO SO, AND, IN
18 FACT, DID SO IN THIS PARTICULAR CLAIM.

19 AND AS THE GREENBERG CASE INSTRUCTS, WHEN THERE
20 IS AN ABSENCE OF OBJECTIVE EVIDENCE, THEN THERE IS A
21 PRESUMPTION THAT THE INVENTOR DIDN'T INTEND TO PROCEED IN
22 THAT WAY, AND THAT WORDS DON'T GET LIMITED DOWN.

23 NOW, IN RESPONSE TO THOSE HURDLES, RSA HAS
24 OFFERED A NUMBER OF DIFFERENT ARGUMENTS. FIRST, THEY TOLD
25 US THAT ANY ONE WORD, SINGLE VERB THAT'S EXPRESSED AS A

1 FUNCTION, CLEARLY INDICATES "STEP PLUS FUNCTION" LANGUAGE.
2 AND IN ONE OF THOSE MULTIPLE BRIEFS THAT WE JUST GOT
3 CRITICIZED FOR FILING, WE POINTED OUT THE LEGIONS OF CASES
4 TO THE CONTRARY. SO THAT ARGUMENT HAS NOW BEEN DROPPED
5 AND THEY CAME UP WITH NEW ARGUMENTS, WHICH WERE WHAT
6 PROMPTED THE NEW BRIEF.

7 AND IN PARTICULAR, THEY ARE NOW SAYING THAT,
8 "WHILE EVEN THOUGH YOU DON'T USE THE WORDS 'STEPS FOR' AND
9 EVEN THOUGH WE CAN'T FIND ANY OBJECTIVE EVIDENCE OF AN
10 INTENT ANYWHERE IN THE PROSECUTION HISTORY TO EXERCISE
11 112.6, THE COURT SHOULD, NONETHELESS, CONCLUDE THAT THAT
12 WAS THE INTENT HERE, BECAUSE THE WORDS 'STEPS' DO APPEAR
13 IN THIS PATENT."

14 WELL, THE FIRST PROBLEM IS: "STEPS," WITH OR
15 WITHOUT AN ACCOMPANYING PREPOSITION, LET ALONE THE KEY
16 PREPOSITION, "FOR," THE WORD "STEPS" DOESN'T APPEAR
17 ANYWHERE IN CLAIM 1; THE WORD "STEPS" DOESN'T APPEAR
18 ANYWHERE IN CLAIM 2.

19 WE HAVE CLAIMS 3, 4 AND 5 -- AND PERHAPS IF WE
20 CAN GET THOSE PUT UP, I APPEAL TO MR. FLINN FOR SOME
21 ASSISTANCE HERE. MAYBE WE CAN JUST PUT THEM ON --

22 I DON'T MEAN TO HAVE YOU LOOK LIKE SOMETHING OUT
23 OF ALICE IN WONDERLAND.

24 MR. FLINN: MEANER THINGS HAVE BEEN SAID ABOUT
25 ME.

1 THE COURT: SEE HOW SMALL MY PATENT IS?

2 MR. KENNEDY: IN 3 AND 4 AND 5, WE DO HAVE
3 EITHER THE WORDS "STEPS" OR "STEPS OF" THAT APPEAR, IN
4 VARIOUS PLACES.

5 AGAIN, AS GREENBERG TELLS US, COMPETENT COUNSEL
6 THAT WANTS TO INVOKE 112.6 USES "STEPS FOR" AS THE
7 LANGUAGE. HERE, RSA HAS TOLD US, "WELL, WE DON'T EXACTLY
8 HAVE 'STEPS FOR,' BUT WE'VE GOT SOMETHING THAT'S AWFULLY
9 CLOSE, SO WE OUGHT TO ASSUME THAT THAT'S WHAT DID THE
10 TRICK.

11 AND THAT WAS THE REASON WHY WE CITED THOSE MANY
12 CASES THAT ARE INCLUDED IN THE APPENDIX. AND
13 MR. HASLAM IS ABSOLUTELY RIGHT, THAT IN THOSE CASES,
14 NOBODY CAME FORWARD AND SAID "STEPS" OR "STEPS OF" MAKE
15 SOMETHING INTO A 112.6 CLAIM.

16 AND THAT WAS OUR POINT, AND I'M SORRY HE
17 MISUNDERSTOOD IT. WE CITED THE CASES FOR THE PROPOSITION
18 THAT: HOW IS IT THAT ALL OF THE RESOURCEFUL PATENT
19 LAWYERS IN THOSE CASES, WHO WERE RAISING EVERY ARGUMENT
20 THEY COULD FIND, IN MANY CASES, TO TRY TO INVALIDATE A
21 PATENT, DIDN'T TUMBLE ON THIS OBVIOUS ARGUMENT THAT WE'RE
22 NOW TOLD THAT "STEPS," "STEPS OF," AND "STEPS FOR" ALL
23 MEAN THE SAME THING. AND HOW WAS IT THAT ALL THOSE
24 FEDERAL CIRCUIT PANELS THAT WERE GRAPPLING WITH THESE
25 CASES DIDN'T FIND THAT THEY HAD, IF I CAN USE THE PHRASE

1 "TRAP DOOR," SHORTCUT TO DISPOSE OF THESE MATTERS BY
2 SAYING, "OH, THIS IS EASY. THIS IS A 112.6 KIND OF CASE"?

3 OUR POINT WAS NOT THAT IT WAS RESOLVED IN THOSE
4 ISSUES. BUT IF IT'S SO APPARENT, WHY HAS IT BEEN MISSED
5 AND NOT RECOGNIZED UP UNTIL NOW?

6 AND I THINK THE CASE THAT'S MOST ILLUSTRATIVE IN
7 THAT REGARD IS THE ARRHYTHMIA RESEARCH DECISION, WHICH IS
8 CITED IN THE BRIEF, OF COURSE, AND IT APPEARS AT 958 F.2D
9 1053. WHAT I FIND SIGNIFICANT THERE IS THAT ARRHYTHMIA
10 INVOLVED TWO DIFFERENT CLAIMS. ONE WAS A METHOD CLAIM,
11 AND THE OTHER WAS AN APPARATUS CLAIM.

12 AND THE COURT WENT TO CONSIDERABLE LENGTH TO
13 ANALYZE THE METHOD CLAIM, WHICH WAS PHRASED IN TERMS OF
14 COMPRISING THE STEPS OF, SAME EXACT LANGUAGE THAT WE'VE
15 GOT HERE. AND THE COURT HAD NO TROUBLE ANALYZING THAT AS
16 A METHOD CLAIM AND FINDING IT TO BE VALID.

17 THE COURT THEN TURNED TO THE APPARATUS CLAIM AND
18 SAID, ON PAGE 160, NOW WE'RE DEALING WITH A CLASSIC 112.6
19 CLAIM AND SUBJECTED IT TO A WHOLLY DIFFERING ANALYSIS.

20 AND MY POINT IS: WHY DID THE COURT SPEND EIGHT
21 PAGES TALKING ABOUT THIS METHOD CLAIM WITH "STEPS OF" IF,
22 IN FACT, IT WAS JUST ANOTHER 112.6 CLAIM? AT A MINIMUM,
23 THEY COULD HAVE TRUNCATED IT, AT AN ABSOLUTE MINIMUM,
24 RSA'S COUNSEL, OR AT LEAST THE FIRST PEOPLE, TO EVER MAKE
25 THE ARGUMENT THAT "STEPS," "STEPS OF," OR "SUCH THAT,"

1 WHICH IS THEIR OTHER ARGUMENT, CAN BE TREATED AS THE
2 EQUIVALENT OF "STEPS FOR."

3 TURNING NEXT TO "SUCH THAT" AND THE RAYTHEON
4 DECISION, LET ME JUST LET THE OPINION SPEAK FOR -- WE CAN
5 TAKE THOSE DOWN, THANKS.

6 READING DIRECTLY FROM THE RAYTHEON OPINION, AT
7 957:

8 "THOUGH, AS DISCUSSED ABOVE, THE PHRASE IS BASED
9 ON TORREY'S ERRONEOUS THEORY RESPECTING THE
10 ABSENCE OF WAVEGUIDE FOULING, AND THOUGH THE
11 FUNCTIONAL LANGUAGE IS INTRODUCED BY 'SO THAT',
12 WE MUST READ THE PHRASE AS THE EQUIVALENT OF ONE
13 SPECIFYING AS AN ELEMENT IN THE CLAIM 'MEANS FOR
14 CONTINUING CONVECTION DURING AUTOIGNITION.'"

15 AND, AGAIN, THE COURT OBVIOUSLY CAN READ AND
16 UNDERSTAND THAT AS WELL OR BETTER THAN ANYBODY ELSE. I
17 READ THAT AS A COURT SAYING, NOT THAT "SO THAT" IS MEANS
18 LANGUAGE -- WE'VE GOT TWO OF THOSE IN THERE -- AND DISPUTE
19 THAT THE COURT GOES AHEAD AND FINDS, ON THE PARTICULAR
20 FACTS OF THAT CASE, THAT IT CONSTITUTED MEANS LANGUAGE.

21 AND FINALLY, WE GET TO ROBERTS AND ZIMMERLEY.
22 AND I THINK THIS IS ABSOLUTELY CRUCIAL, SINCE SO MUCH
23 EMPHASIS HAS BEEN PLACED ON THEM. THE KEY DISTINGUISHING
24 FACTOR: IN BOTH ROBERTS AND ZIMMERLEY, THE PATENT OFFICE
25 HAD REFUSED TO ISSUE A PATENT. AND THE APPLICANT WAS IN

1 BEFORE THE COURT SEEKING TO GET A PATENT.

2 AND ALTHOUGH THE RECORD IN ROBERTS AND ZIMMERLEY
3 IS SOMEWHAT SCANT, AND WE DON'T HAVE THE BRIEFS, THE CLEAR
4 IMPORT OF THOSE CASES SEEMS TO BE THAT THE PATENT HOLDER
5 WAS ARGUING, AT A MINIMUM, "I'VE MET THE 112.6" -- OR THEN
6 THE 112.2 -- STANDARD. I MEAN, THERE ARE ONLY TWO PARTIES
7 TO THOSE CASES, THE PATENT OFFICE AND THE APPLICANT, SO IT
8 ISN'T THE PATENT OFFICE THAT'S GOING TO BE IN SAYING,
9 "EVEN THOUGH WE'VE REJECTED THIS CLAIM, GEE, YOU OUGHT TO
10 TAKE A LOOK AT IT. MAYBE IT WOULD SUFFICE UNDER 112.6."

11 WHAT THE UNARTICULATED BUT OBVIOUS PREMISE IN
12 BOTH OF THOSE CASES IS: THE APPLICANT WAS SAYING, "I
13 INTENDED TO INVOKE 112.6. AND MAYBE I'M NOT ENTITLED TO A
14 METHOD CLAIM, BUT I WOULD AT LEAST BE ENTITLED TO SOME
15 SMALLER CLAIM UNDER 112.6."

16 IN CONTRAST -- AND HE'S BEEN HERE
17 CONSPICUOUSLY -- THERE IS NOT A DECLARATION OR ANY
18 TESTIMONY FROM PROFESSOR HELLMAN SAYING, "I INTENDED TO
19 INVOKE 112.6."

20 AND THAT BECOMES WHAT I THINK IS MOST
21 SIGNIFICANT HERE. THIS COURT IS BEING ASKED TO DO
22 SOMETHING THAT, AS FAR AS I KNOW, NO COURT HAS EVER BEEN
23 ASKED TO DO BEFORE, AND CERTAINLY NO COURT HAS EVER DONE,
24 AND THAT'S TO DO THE FOLLOWING: TO TAKE CLAIMS THAT DO
25 NOT USE THE WORDS "STEPS FOR" IN A CASE WHERE THE

1 PROSECUTION HISTORY IS SILENT REGARDING ANY INDICATION TO
2 INVOKE 112.6.

3 AND, AGAIN, 112.6 IS SOMETHING THE PATENTEE GETS
4 TO INVOKE, IN A CASE WHERE, IN OTHER CLAIMS, THE PATENT
5 HOLDER DID INVOKE 112.6, AND MOST IMPORTANT OF ALL, WHERE
6 THE PATENT HOLDER IS MAKING NO PLEA TO THE COURT SAYING,
7 "SAVE ME. IF YOU CAN'T FIND THIS AS A METHOD CLAIM, AT
8 LEAST GIVE ME A 112.6 CLAIM." THAT PLEA IS NOT BEING MADE
9 HERE.

10 YES, WE ARE PUTTING OUR EGGS IN THE VALIDITY
11 BASKET, AND WE ARE PREPARED TO DEFEND THE VALIDITY OF
12 THESE CLAIMS AS METHOD CLAIMS. AND SO WE GET TO THIS
13 IRONIC SITUATION THAT MR. HASLAM IS SOMEHOW TRYING TO SAVE
14 US FROM OURSELVES AND IS SAYING, "DON'T GO THAT FAR. I'M
15 TRYING TO COME UP WITH A WAY WHERE YOU, PROFESSOR HELLMAN,
16 WILL STILL HAVE A VALID CLAIM AT THE END OF THE DAY."

17 WELL, WE KNOW MR. HASLAM IS A VERY DECENT HUMAN
18 BEING. UNDER ADVERSARIAL LITIGATION, I THINK WE CAN
19 ASSUME THAT IT'S NOT A FAVOR THAT'S COMING FROM THAT SIDE
20 OF THE TABLE. WHATEVER IT IS, WHATEVER ITS MOTIVATION, WE
21 DON'T WANT IT. WE'RE NOT ASKING FOR IT.

22 AND I'M UNAWARE OF ANY LAW THAT SAYS WHEN THE
23 HOLDER OF THE PATENT IS PREPARED TO TEST VALIDITY ON A
24 METHOD BASIS, THAT THE COURT HAS THE OBLIGATION OR EVEN
25 THE RIGHT TO SAY, "I'M GOING TO THROW YOU A LIFE PRESERVER

1 EVEN THOUGH YOU DIDN'T ASK FOR ONE, AND I'M GOING TO
2 REINTERPRET YOUR CLAIM, AND TO DO THAT, I'M GOING TO HAVE
3 TO PHYSICALLY READ WORDS IN HERE," AND I SAY I THINK END
4 UP WITH A CLAIM THAT I THINK IS INDISTINGUISHABLE FROM
5 SIX, IN VIOLATION OF WHAT'S PERMITTED THERE.

6 SO THESE ARE A NUMBER OF FIRSTS THAT ARE BEING
7 ASKED FOR, THAT, AS FAR AS I KNOW, HAVE NEVER BEEN
8 REQUESTED, LET ALONE PROVIDED BY THE COURT.

9 NOW, THERE ARE A NUMBER OF OTHER CASES THAT HAVE
10 OBVIOUSLY BEEN DISCUSSED. BUT I THINK WHAT I JUST SAID IS
11 THE KEY FOR THE ANALYTICAL PURPOSE HERE.

12 AND I WANT TO MAKE VERY CLEAR WHAT WE'RE DOING
13 BY NOT ASKING FOR 112.6 PROTECTION, IF I CAN CALL IT THAT,
14 AT THIS POINT: I UNDERSTAND WE'RE IRREVOCABLY WAIVING IT
15 FOR ALL TIME. AND IF, ON THE 30TH, YOUR HONOR ANNOUNCES A
16 TENTATIVE DECISION THAT SAYS, WE DON'T THINK THIS CLAIM IS
17 VALID, I'M NOT GOING TO BE ABLE TO SLITHER UP HERE THEN
18 AND SAY, "JUDGE, COULD WE REVISIT THE 112.6 THING? WE'D
19 AT LEAST LIKE TO HAVE A CHANCE ON THAT."

20 IT'S GONE FOR ALL TIME. WE DON'T THINK IT WAS
21 EVER IN THE RECORD TO START WITH. BUT WE ARE NOT ASKING
22 FOR IT NOW.

23 SO THE DECISION BEFORE THIS COURT TODAY
24 OBVIOUSLY IS NOT VALIDITY. THAT'S TO COME LATER. THE
25 QUESTION BEFORE THIS COURT IS AGAINST THAT RECORD, WITH

1 THAT LACK OF OBJECTIVE EVIDENCE, AND THAT LACK OF A
2 REQUEST BY THE PLAINTIFF -- EXCUSE ME, BY THE PATENT
3 HOLDER FOR 112.6 CONSTRUCTION, DOES THE COURT HAVE ANY
4 BASIS FOR READING 112.6 LIMITATIONS INTO THE LANGUAGE.

5 NOW, THERE OBVIOUSLY ARE A NUMBER OF OTHER
6 CASES, MODINE, ET CETERA, THAT HAVE BEEN CITED. I THINK
7 EVERY DISTINCTION THAT SHOULD BE MADE AND SOME THAT
8 PROBABLY HAVEN'T ARE ALREADY BEFORE THE COURT.

9 IF THERE ARE ANY OTHER PARTICULAR POINTS,
10 THOUGH, THAT THE COURT WOULD LIKE COMMENT OR ATTEMPTED
11 RESPONSE, I'D BE PLEASED TO ADDRESS THOSE. OTHERWISE,
12 WE'RE PREPARED TO SUBMIT AT THIS POINT.

13 THE COURT: NO. THAT'S ALL. THANK YOU.

14 MR. KRAMER: KARL KRAMER.

15 ADDRESSING THE SECOND POINT MR. HASLAM RAISED,
16 IT IS CORRECT THAT THE PARTIES ARE WORKING ON A
17 STIPULATION TO TRY TO DETERMINE THE SPECIFIC EMBODIMENTS
18 IN THE PATENT THAT MATCH UP WITH CERTAIN OF THE CLAIM
19 LANGUAGE.

20 AND I WANT TO MAKE CLEAR THAT FOR CLAIM 6, UNDER
21 THE LAW, THE COMPARISON THE COURT MUST MAKE IS TO LOOK AT
22 THE LANGUAGE OF THE CLAIM AFTER THE WORDS "MEANS FOR" AND
23 DETERMINE WHETHER THAT LANGUAGE IS MET AND THEN COMPARE
24 THE STRUCTURE IN THE PATENT WITH THE STRUCTURE OF THE
25 ACCUSED DEVICE.

1 WE TOOK THE DEPOSITION OF MR. DUSSE, RSA'S
2 EXPERT. WE ARE WILLING TO STIPULATE TO THAT DEPOSITION
3 TESTIMONY AS TO THE STRUCTURES. AND I RECOMMEND THE
4 DEPOSITION TO THE COURT FOR ITS READING, AND WE WILL
5 SUBMIT IT.

6 THE STRUCTURES WERE IDENTIFIED IN THAT
7 DEPOSITION, AND WE SUBMITTED A PROPOSAL TO RSA THAT IS
8 TAKEN VERBATIM FROM THAT TESTIMONY. AND I'M SURPRISED TO
9 SEE MR. HASLAM ARGUING THAT IT'S DIFFERENT THAN THAT, BUT
10 HE'S REALLY ARGUING WITH MR. DUSSE, NOT WITH US.

11 THE COURT: THANK YOU.

12 MR. SCHLAFLY?

13 MR. SCHLAFLY: I JUST HAVE A COUPLE COMMENTS,
14 BECAUSE I'LL TRY NOT TO DUPLICATE THE ARGUMENTS THE OTHERS
15 HAVE MADE.

16 AND I JUST WANT TO SAY THAT ALL OF THIS 112,
17 SECTION 6 STUFF IS BASED ON SOME THEORY THAT THE FEDERAL
18 CIRCUIT HAS COOKED UP IN THE LAST TWO YEARS. AND WE HAVE
19 TO LIVE WITH IT, THAT'S TRUE.

20 BUT IT'S A THEORY THAT WAS NOT APPLICABLE TO THE
21 PATENT OFFICE AT THE TIME THIS PATENT WAS APPLIED FOR.
22 AND WHEN THESE CLAIMS WERE EXAMINED, THESE WERE EXAMINED
23 UNDER AN ENTIRELY DIFFERENT THEORY, AND THAT IS, THE
24 PATENT OFFICE WOULD GIVE THE CLAIMS THE BROADEST POSSIBLE
25 READING, AND THEY WOULD NOT BE SUBJECT TO THESE 112.6

1 LIMITATIONS THAT THE FEDERAL CIRCUIT HAS COOKED UP IN THE
2 LAST COUPLE OF YEARS.

3 OKAY. THE OTHER POINT I'D LIKE TO MAKE IS THAT
4 IF YOU LOOK AT CLAIM 1 AND CLAIM 6, I MEAN, THE PROBLEM WE
5 HAVE HERE TODAY IS THAT THE LITERAL READING OF THESE
6 CLAIMS WOULD SEEM TO COVER ALL OF PUBLIC KEY. AND THAT'S
7 JUST -- THAT'S JUST THE WAY IT IS. AND THE QUESTION -- I
8 MEAN, THE REAL QUESTION WE HAVE IS: IS THERE SOME LEGAL
9 THEORY UNDER WHICH THE LEGAL INTERPRETATION OF THOSE
10 CLAIMS IS NARROWER.

11 THE COURT: 112.6 OR SOMETHING ELSE.

12 MR. SCHLAFLY: WHETHER UNDER 112.6 OR SOMETHING
13 ELSE, THAT'S THE REAL QUESTION.

14 THANK YOU.

15 THE COURT: OKAY.

16 MR. HASLAM: I HAVE JUST A FEW QUICK CONCLUDING
17 REMARKS.

18 THE COURT: YES.

19 MR. HASLAM: JUST ON THE CLAIM 6 ISSUE FOR A
20 MOMENT, WE HEARD THE TESTIMONY HERE FROM MR. DUSSE. AND
21 IF THEY THOUGHT IT WAS WORTHWHILE CROSS-EXAMINING HIM TO
22 POINT OUT THE STRUCTURES, THEY COULD HAVE.

23 WE HAVE SUBMITTED, AND I WOULD ASK, I GUESS
24 RHETORICALLY, THE SAME QUESTION TO MR. KRAMER THAT HE
25 TRIED TO PUT TO ME: THEIR INTERROGATORY RESPONSES, WHEN

1 WE PUT THOSE IN THE STIPULATION, THEY WEREN'T PREPARED TO
2 STIPULATE TO THAT.

3 AND I BELIEVE IT'S BECAUSE WHEN THEY PREPARED
4 THEIR INTERROGATORY RESPONSES, THEY MORE FAITHFULLY
5 FOLLOWED THE DICTATES OF PARAGRAPH 112, SECTION 112,
6 PARAGRAPH SIX, AND THEY INCLUDED IN THE INTERROGATORY
7 RESPONSES NOT ONLY THE STRUCTURAL ELEMENTS AS DEPICTED IN
8 THE FIGURES, BUT THE SPECIFICATION CITES WHICH SHOW THAT
9 THAT CIRCUIT ELEMENT WAS CONFIGURED AND HOOKED UP IN A
10 CERTAIN WAY TO ACHIEVE THE SPECIFIED FUNCTION.

11 TURNING TO JUST A FEW COMMENTS ON WHAT
12 MR. KENNEDY SAID, AND ONE THING THAT MR. SCHLAFLY SAID,
13 FIRST OF ALL, THE DOCTRINE OF CLAIM DIFFERENTIATION IS
14 OFTEN CITED BOTH WAYS. BUT IT REALLY IS -- AND THE COURT
15 HAS SAID IN LAITRAM, AND I BELIEVE IN THE TANDEM CASE --
16 IT'S A HELPFUL AID, BUT IT REALLY HAS ITS LIMITED
17 UTILITIES. IF, IN FACT, THE INVENTOR HAS INVENTED ONE
18 THING, IT DOESN'T MATTER HOW MANY DIFFERENT WAYS HE TRIES
19 TO CLAIM IT; HE'S LIMITED TO CLAIMING THAT ONE INVENTION.

20 SO CLAIM DIFFERENTIATION, MR. KENNEDY FINDS
21 CASES THAT SAY IT'S HELPFUL, AND I FIND CASES WHERE IT'S
22 BEEN REJECTED. AND IT REALLY IS, I THINK, THE PROVERBIAL
23 NOSE OF WAX. IT ISN'T GOING TO DO YOU ANY GOOD HERE.

24 I ALSO DISAGREE THAT 112.6 IS AN OPTION. THE
25 LANGUAGE IN THE STATUTE MAY -- I THINK IS PERMISSIVE AT

1 THE CLAIM DRAFTING PHASE. IT ISN'T SOMETHING YOU CAN DO
2 AFTER THE FACT AND SAY, "I CAN ELECT IT OR NOT ELECT IT."
3 THE ELECTION MR. KENNEDY SPOKE ABOUT IS ONE THAT THEY MADE
4 WHEN THEY GOT THE PATENT, NOT ONE THAT HE CAN MAKE TODAY.

5 THE OPTION, IF THERE IS ONE, IS THAT YOU CAN
6 DRAFT IT UNDER 112.6 OR YOU CAN PUT IT IN THE CLAIM
7 LANGUAGE. IF YOU DON'T PUT IT IN 112.6 OR YOU DON'T
8 CONSTRUE IT SUBJECT TO 112.6, YET YOU, NONETHELESS, ARE
9 FUNCTIONAL, YOU DON'T HAVE AN OPTION. THE CASE LAW SAYS
10 THAT THE CLAIM IS INVALID.

11 AND THE POINT THAT MR. SCHLAFLY MADE AT THE END,
12 TWO POINTS, ONE IS WRONG, AND THE OTHER IS, PERHAPS,
13 RIGHT. THIS IS NOT SOMETHING THAT THE FEDERAL CIRCUIT HAS
14 COOKED UP IN THE LAST TWO YEARS.

15 THE RAYTHEON CASE WAS DECIDED IN 1983. AND
16 THERE WAS NO EVIDENCE THERE WHICH WOULD SATISFY THE
17 GREENBERG TEST, NO EVIDENCE OF PROSECUTION HISTORY, NO
18 EVIDENCE ON INTENT. THEY COULD HAVE PUT MR. HELLMAN ON
19 THE STAND IF THEY THOUGHT HIS INTENT WAS THAT IMPORTANT ON
20 THIS ISSUE; THEY COULD HAVE BROUGHT OTHERS HERE AND PUT
21 THEM ON IF THEY THOUGHT THAT INTENT WAS THAT IMPORTANT.

22 BUT I WOULD SUBMIT THAT BACK IN 1976, WHEN THESE
23 CLAIMS WERE PROSECUTED, IS THE ONLY EVIDENCE BEFORE THE
24 COURT RIGHT NOW ON WHAT THE PATENT OFFICE DID.

25 THIS IS THE ROBERTS CASE. THAT WAS DECIDED IN

1 1973. AND REGARDLESS OF WHO ASKED FOR WHAT, IN THE
2 ROBERTS CASE, THE COURT SAID: WHEN YOU GET CLAIMS LIKE
3 THIS, YOU CAN'T REJECT THEM, NOT UNDER 112, PARAGRAPH
4 THREE. ALTHOUGH THAT'S AN ISSUE, YOU CAN'T REJECT THEM ON
5 OVERBREADTH WITHOUT AT LEAST EXAMINING WHETHER OR NOT THEY
6 COMPLY WITH 112, PARAGRAPH THREE.

7 AND I WOULD SUBMIT THAT THE EVIDENCE IS THAT IF
8 YOU WANT TO GO BACK NOW AND TRY TO DETERMINE WHAT THE
9 PATENT OFFICE THOUGHT IT WAS DOING, IT PROBABLY APPLIED
10 BECAUSE IT WAS ONLY HANDED DOWN THREE YEARS BEFORE BY THE
11 COURT OF CUSTOMS AND APPEALS, THE ROBERTS CASE.

12 AND IT SAID: YES, BEFORE ROBERTS, WE WOULD HAVE
13 REJECTED THIS CLAIM AS BEING TOO BROAD AND INDEFINITE.
14 BUT ROBERTS SAYS WE CAN'T DO THAT UNTIL WE'VE CHECKED 112,
15 PARAGRAPH THREE. AND IF, UNDER 112, PARAGRAPH THREE, THE
16 SPECIFICATION PROVIDES CONTENT FOR ALL THIS, THEN YOU
17 CAN'T REJECT IT.

18 AND THAT'S WHAT THE PATENT OFFICE WAS PROBABLY
19 DOING WHEN IT EXAMINED THIS.

20 THE COURT: THANK YOU.

21 MR. KENNEDY: VERY BRIEFLY, YOUR HONOR.

22 ON ROBERTS -- AND IT BECOMES PIVOTAL TO THE
23 COURT'S ANALYSIS -- I REALLY THINK THE TWO PARAGRAPHS IN
24 THE CASE, PARTICULARLY, ON PAGE 1403, ARE SIGNIFICANT.
25 THE COURT, AS I READ IT, SAYS THEY ARE DISAGREEING WITH

1 THE BOARD'S ENTIRE CHARACTERIZATION OF THE LANGUAGE, IN
2 JUST SAYING WE DON'T AGREE WITH ANYTHING YOU'VE DONE HERE.

3 BUT HERE IS THE KEY POINT. ROBERTS IS A 1973
4 CASE. ZIMMERLEY IS A BOARD CASE FROM 1967. GREENBERG IS
5 1996. GREENBERG TELLS US: WHEN "STEPS FOR" DOESN'T
6 APPEAR IN THE CASE, THERE HAS GOT TO BE SOME OBJECTIVE
7 EVIDENCE OF INTENT TO INVOKE 112.6.

8 NOW, EITHER THERE WAS SUCH OBJECTIVE EVIDENCE IN
9 ROBERTS AND ZIMMERLEY, IN WHICH CASE THEY ARE NOTHING BUT
10 PRECURSORS OF GREENBERG, OR, ALTERNATIVELY, SUCH OBJECTIVE
11 EVIDENCE WAS LACKING, IN WHICH CASE THEY'RE SIMPLY BAD
12 LAW, IN LIGHT OF THE FEDERAL CIRCUIT'S MORE RECENT
13 PRONOUNCEMENT IN GREENBERG.

14 BUT AGAIN, IN NONE OF THOSE CASES -- AND I'M
15 SURE YOUR HONOR ISN'T GOING TO FIND IT -- IS THERE EVER A
16 CASE THAT SAYS: EVEN WHEN THE PATENT HOLDER IS MAKING NO
17 CLAIM OF A DESIRE TO INVOKE 112.6, AND EVEN THOUGH THERE
18 IS NO OBJECTIVE EVIDENCE OF IT, THE COURT CAN READ WORDS
19 INTO A CLAIM -- AND THAT'S WHAT'S GOING TO REQUIRE HERE,
20 ACTUALLY PASTING IN "STEPS FOR" TO MAKE THIS COMPLY IN
21 THAT REGARD. AND THAT'S NEVER HAPPENED.

22 AND FINALLY, AS LONG AS MR. SCHLAFLY IS TALKING
23 BLUNTLY, LET ME DO THE SAME. OBVIOUSLY, THE CONCERN HERE
24 IS: THESE FOLKS DON'T THINK THEIR VALIDITY ATTACK IS AS
25 STRONG AS THEY WOULD LIKE IT TO BE. THEY'VE GOT SOME

1 CONCERNS ABOUT WHAT'S GOING TO HAPPEN UNDER A CLEAR AND
2 CONVINCING STANDARD ON OCTOBER 30; AND THEREFORE, UNDER
3 THIS GUISE OF BEARING GIFTS, THEY'VE COME UP WITH THIS
4 MARVELOUS WAY AS TO HOW THEY CAN SAVE OUR PATENT FROM US.

5 AGAIN, THAT'S WHAT'S GOING ON HERE. WE DON'T
6 WANT THE GIFT. IT'S AN UNRECOGNIZED THEORY. AND LET'S
7 TAKE THE CLAIMS THE WAY THEY'RE PLEADED NOW AND GET ON
8 WITH THE BUSINESS OF DETERMINING WHETHER THEY'RE VALID OR
9 NOT.

10 THEY ARE VERY BROAD; THERE IS NO QUESTION ABOUT
11 IT. IT'S OUR POSITION PIONEERING PATENTS ARE GENERALLY
12 BROAD, BUT THAT'S AN ISSUE FOR THE 30TH, NOT FOR TODAY.

13 THANK YOU.

14 THE COURT: THANK YOU. WE'LL TAKE A RECESS NOW,
15 AND THEN WE'LL COME BACK AND WE'LL ARGUE THE MOTION TO
16 REMAND. TWENTY MINUTES.

17 (RECESS TAKEN AT 2:49 P.M.)

18 (PROCEEDINGS RESUMED AT 3:16 P.M.)

19 THE COURT: PLEASE BE SEATED.

20 THIS IS A MOTION TO REMAND THE ISSUES FROM THE
21 ARBITRATION PANEL. WHO IS GOING TO ARGUE THE MATTER?

22 MR. FLINN: PATRICK FLINN FOR THE DEFENDANTS,
23 YOUR HONOR.

24 MR. HAWK: I'M A NEW FACE, YOUR HONOR.
25 ROBERT HAWK FROM THE HELLER, EHRMAN FIRM, AND I'LL BE

1 ADDRESSING THIS.

2 THE COURT: THANK YOU.

3 MR. FLINN: YOUR HONOR, IN THE STATE WHERE I
4 PRACTICE NOW, IN GEORGIA, THE FEDERAL COURTS DO NOT HAVE
5 ORAL ARGUMENT AS A RULE ON PRETRIAL MOTIONS AT ALL. AND
6 SO I HAVE COME, SINCE I MOVED TO ATLANTA, TO VIEW THIS AS
7 VERY MUCH A PRIVILEGE THAT I DON'T WANT TO OVERSTAY, SO
8 I'LL TRY AND SAY AS LITTLE AS POSSIBLE IN THIS PROCESS.

9 AND WHAT I REALLY THOUGHT WOULD BE USEFUL AT
10 ALL, SINCE I AM, I THINK, THE ONLY PERSON IN THE ROOM WHO
11 WAS AT ALL OF THE ARBITRATION SESSIONS THAT HAVE TAKEN
12 PLACE SO FAR, IS TO GIVE YOU SOME IDEA OF WHAT HAS GONE ON
13 THERE.

14 I THINK IT'S NOT -- JUST SO YOUR HONOR IS AWARE
15 OF WHAT'S BEEN GOING ON IN THE ARBITRATION SINCE SEPTEMBER
16 OF LAST YEAR, AS YOU MAY KNOW, ONE OF THE ISSUES DECIDED
17 BACK IN SEPTEMBER WAS: WOULD CYLINK GET A LICENSE TO
18 PRACTICE THE RSA PATENT?

19 AND SINCE SEPTEMBER, THERE HAVE BEEN NO FEWER
20 THAN FOUR FURTHER RULINGS FROM THE ARBITRATORS ON THAT
21 QUESTION. AND MOST RECENTLY, LAST WEEK, RSA HAS RAISED A
22 NEW MOTION TO THE ARBITRATORS, A WHOLE NEW QUESTION ABOUT
23 OUR LICENSE. SO THERE IS STILL A VERY MUCH ALIVE AND
24 ONGOING ARBITRATION PROCEEDING. THE PANEL IS THERE AND
25 READY TO DECIDE IT.

1 THE OTHER RELEVANT FACTS THAT I THINK MAKE THE
2 MOST DIFFERENCE ARE THAT THIS IS UNDISPUTEDLY -- THE ISSUE
3 THAT YOUR HONOR FRAMED IN YOUR SUMMARY JUDGMENT RULING OF
4 MAY 17, 1996, WHAT YOU REFERRED TO ON PAGE SEVEN AS THE
5 DISPOSITIVE ISSUE, IS UNQUESTIONABLY ARBITRABLE WITHIN THE
6 SCOPE OF THE ARBITRATION CLAUSE, AND THEY DON'T DISPUTE
7 THAT. AND EQUALLY CLEAR IS THAT IT IS A MANDATORY RULE
8 UNDER THE FEDERAL ARBITRATION ACT. IT IS NOT SOMETHING
9 THAT IS DISCRETIONARY.

10 THE OTHER THING THAT IS PROBABLY WORTH
11 MENTIONING IS THAT THE PATENT STATUTE ITSELF CONTEMPLATES
12 THAT EVEN ISSUES AS CENTRAL AS VALIDITY AND ENFORCEABILITY
13 CAN BE ARBITRATED UNDER SECTION 294 OF THE PATENT ACT.

14 NOW, WE ARE NOT IN THAT SITUATION, BUT THERE IS
15 SUGGESTION IN THE RSA PAPERS THAT PATENT ISSUES OR ISSUES
16 THAT ARE CLOSE TO PATENT QUESTIONS CANNOT BE ARBITRATED IS
17 SIMPLY WRONG. AND I THINK THAT IS A RELEVANT FACT.

18 THE OTHER ISSUES ABOUT WAIVER, WE THINK WE HAVE
19 DOCUMENTED. THERE ARE REPEATED TIMES WE HAVE COME INTO
20 THIS COURT AND SAID, IF IT HASN'T ALREADY BEEN DECIDED, IT
21 IS ARBITRABLE, OR DOCUMENTED. AND I DON'T THINK AT ANY
22 POINT DID WE DO ANYTHING THAT COMES WITHIN THE HEAVY
23 BURDEN THAT RSA MUST SHOW TO SHOW WAIVER OF THIS MANDATORY
24 RIGHT.

25 AND THE CASES ARE LEGION IN WHICH CERTAIN ISSUES

1 THAT ARE ARBITRABLE ARE DECIDED INDEPENDENTLY OF THE
2 COURT. AND THAT HAPPENS ALL THE TIME.

3 WE COME DOWN TO THE FACT THAT YOUR HONOR HAS
4 IDENTIFIED WHAT YOU REFERRED TO AS A DISPOSITIVE ISSUE.
5 IT TURNS ON THE PKP RELATIONSHIP, WHAT THE PARTIES AGREED
6 TO, HOW THAT BUSINESS OPERATED DURING ITS OPERATION,
7 SOMETHING THE PANEL HEARD MANY DAYS OF TESTIMONY ON, AND
8 THEY ARE STANDING BY AND WAITING.

9 RSA ASKED THEM TO WAIT FOR YOUR HONOR TO RULE
10 BEFORE THEY DID ANYTHING, AND THEY HAVE ACCEPTED THAT.
11 THEY ARE WAITING TO RESPOND TO YOUR DIRECTION IN THIS
12 MATTER. AND ASSUMING THAT YOUR HONOR GRANTS THE MOTION,
13 THEY CAN THEN TAKE THE MATTER UP. AND IF THERE IS SOME
14 PROBLEM THEY SEE WITH THEIR JURISDICTION, THEN THEY CAN
15 RAISE IT AT THAT TIME.

16 THANK YOU, YOUR HONOR.

17 THE COURT: OKAY.

18 MR. HAWK: YOUR HONOR, WHAT I WOULD PROPOSE TO
19 DO IS ADDRESS JUST A COUPLE OF THE POINTS THAT COUNSEL
20 JUST RAISED, AND THEN DISCUSS A COUPLE OF THE ISSUES THAT
21 WERE IN OUR BRIEF OPPOSING THIS MOTION TO REMAND AND RAISE
22 SOME MATERIAL THAT WASN'T IN THOSE BRIEFS.

23 FIRST OF ALL, AS MR. FLINN POINTED OUT, THERE
24 HAVE BEEN FURTHER PROCEEDINGS IN THE ARBITRATION BELOW.
25 AND ALTHOUGH I HAVEN'T BEEN A PART OF THOSE ARBITRATION

1 PROCEEDINGS, I HAVE READ THE TRANSCRIPTS IN THE MIT CASE.
2 AND THAT'S THE CASE THAT HE'S REFERRING TO, THAT CERTAIN
3 ACTIVITIES IN THAT CASE RESULTED IN ISSUES BEING REMANDED
4 BACK DOWN TO THE ARBITRATION PANEL.

5 AND I CAN TELL YOU FROM READING THOSE
6 TRANSCRIPTS THAT JUDGE LETTS WAS VERY, VERY UPSET WITH THE
7 ENTIRE PROCESS. HE WAS VERY UPSET WITH THE LAWYERS. WHAT
8 HE WAS UPSET ABOUT IS BECAUSE THE LAWYERS WOULD GET A
9 DECISION OF THE ARBITRATION PANEL AND THEY WOULD COME TO
10 THE COURT, AND THEY WOULD MAKE ARGUMENTS ABOUT WHAT THAT
11 ARBITRATION DECISION MEANT.

12 AND THE JUDGE GOT VERY UPSET WITH THEM BECAUSE
13 THEY WEREN'T ABLE TO AGREE. I THINK HE WAS ALSO VERY
14 UPSET BECAUSE THE ARBITRATION PANEL WASN'T SENDING
15 ABSOLUTELY CLEAR MESSAGES.

16 AND WHAT HAPPENED IS HE ORDERED THE LAWYERS TO
17 GO BACK DOWN A SECOND TIME, AND I THINK MAYBE EVEN A THIRD
18 TIME, AND GET ANOTHER CLARIFICATION FROM THE ARBITRATION
19 PANEL OF WHAT WAS GOING ON.

20 AND WITH ALL RESPECT, YOUR HONOR, IN THIS CASE,
21 I THINK IF YOU CAN AT ALL AVOID THAT SCENARIO, YOU OUGHT
22 TO AVOID IT. YOU HAVE ALREADY PREVIOUSLY IN THIS CASE HAD
23 TO UNDERTAKE THE TASK OF TRYING TO GET BEHIND AN
24 ARBITRATION RULING, WHEN THERE IS A SUMMARY JUDGMENT ON
25 THE RES JUDICATA COLLATERAL ESTOPPEL ISSUE EARLIER IN THIS

1 CASE, AND HAD TO DO SOME VERY CLOSE READING OF WHAT -- AND
2 WHAT YOUR CONCLUSION WAS ABOUT WHAT THE ARBITRATION PANEL
3 DID AND DID NOT DECIDE.

4 RATHER THAN DOING THAT AGAIN IN THIS CASE, YOUR
5 HONOR, WE THINK YOU OUGHT TO KEEP IT HERE. AND I'LL TELL
6 YOU THE REASONS WHY RSA BELIEVES YOU CAN KEEP IT HERE
7 LEGALLY, AND, IN FACT, MUST KEEP IT HERE LEGALLY.

8 BUT AS A PRACTICAL MATTER, I DON'T THINK THIS
9 COURT WANTS TO GO THROUGH THAT AGAIN, WHAT JUDGE LETTS HAS
10 GONE THROUGH AND WHAT THIS COURT HAS HAD TO STRUGGLE WITH
11 BEFORE.

12 THE SECOND ISSUE MR. FLINN RAISES IS THAT RSA
13 DOESN'T DISPUTE THE ARBITRABILITY OF THE ISSUES
14 IDENTIFIED. THAT'S NOT CORRECT IN TWO SENSES. THE FIRST
15 SENSE IS THAT WE DO DISPUTE THE ARBITRABILITY OF THE
16 SPECIFIC CORE PATENT INFRINGEMENT DEFENSES THAT ARE BEFORE
17 YOUR HONOR IN THIS CASE. THOSE CORE DEFENSES OF EQUITABLE
18 ESTOPPEL, LACHES, IMPLIED LICENSE, PATENT EXHAUSTION, ARE
19 JUST NOT ARBITRABLE BECAUSE THE PARTIES DID NOT AGREE TO
20 ARBITRATE THEM.

21 THERE MAY BE SOME ISSUES -- AND WHAT CYLINK DID
22 WAS BREAK OUT A COUPLE OF ISSUES BASED ON YOUR PRIOR
23 ORDER, A COUPLE OF FACT ISSUES, AND SAY: WELL, THESE HAVE
24 GOT TO BE ARBITRABLE.

25 BUT WHAT DOES IT STATE HERE, YOUR HONOR? AND

1 THE QUESTION HERE IS WHETHER YOU STRIP OUT CORE PATENT
2 INFRINGEMENT DEFENSES, REMAND THOSE, ESSENTIALLY, TO THE
3 ARBITRATION PANEL TO DECIDE, STOP ALL DISCOVERY, STOP
4 RSA'S PREPARATION OF THOSE DEFENSES TO PRESENT IN THIS
5 CASE, BUT LET CYLINK PROCEED AHEAD WITH ITS PATENT
6 INFRINGEMENT CLAIMS.

7 THAT SEEMS LIKE, I GUESS, THE ULTIMATE CASE OF
8 CYLINK HAVING ITS CAKE AND EATING IT, TOO. THEY GET TO
9 STOP OUR DEFENSES; THEY GET TO REMAND THEM TO ANOTHER
10 FORUM TO DECIDE; BUT THEY GET TO GO ON IN THIS FORUM WITH
11 THEIR PATENT INFRINGEMENT CLAIMS.

12 AND THE POINT WE MADE -- ONE OF THE POINTS THAT
13 WE MADE IN OUR BRIEF WAS THAT THERE WAS ABSOLUTELY NO
14 AUTHORITY OUT THERE FOR DOING SUCH A THING. THERE IS NO
15 AUTHORITY THAT THEY CITE WHERE A COURT HAS STRIPPED AWAY
16 DEFENSES AND SENT THEM TO ARBITRATION BUT ALLOWED THE
17 UNDERLYING CLAIMS TO GO FORWARD BEFORE THE COURT.

18 WHAT I'D LIKE TO DO, THOUGH, IS TAKE MAYBE THREE
19 OR FOUR MINUTES TO REDUCE THE LEVEL OF ABSTRACTION ABOUT
20 WHAT WE'RE ARGUING ABOUT.

21 WHAT I'D LIKE TO DO IS JUST SHOW THE COURT TWO
22 OR THREE PIECES OF EVIDENCE, THE EVIDENCE THAT GOES TO
23 EQUITABLE ESTOPPEL, THE EVIDENCE THAT GOES TO LACHES THAT
24 CYLINK DOES NOT WANT YOU TO CONSIDER. THEY DON'T WANT YOU
25 TO CONSIDER THESE ISSUES.

1 THEY WANT TO SEND IT BACK, AND THEY WANT
2 ESSENTIALLY THE ARBITRATION PANEL TO OVERRULE YOUR EARLIER
3 RULING THAT THEY HADN'T RULED ON, IF THE ARBITRATION PANEL
4 HADN'T RULED ON IT. AND THEN IF THE ARBITRATION PANEL IS
5 NOT PREPARED TO DO THAT, CYLINK ALTERNATIVELY SAYS: "GO
6 AHEAD AND DECIDE IT ON THE RECORD BEFORE YOU. YOU DON'T
7 NEED TO HAVE ANY OF THE EVIDENCE THAT HAS BEEN DISCOVERED
8 IN THE LITIGATION. YOU HAVE ENOUGH TO DECIDE THIS ISSUE
9 BEFORE. YOU HAVE ENOUGH EVIDENCE TO DECIDE THIS ISSUE
10 RIGHT NOW."

11 BUT LET ME SHOW YOU WHAT SOME OF THE EVIDENCE
12 IS, AND THIS EVIDENCE INCLUDES BOTH EVIDENCE THAT WAS IN
13 THE ARBITRATION, BUT MORE IMPORTANTLY, ALSO EVIDENCE THAT
14 HAS COME TO LIGHT IN THIS CASE, IN DISCOVERY IN THIS CASE,
15 AND EVIDENCE THAT CYLINK NEVER WANTS TO SEE THE LIGHT OF
16 DAY.

17 THE FIRST THING, YOUR HONOR, IS A NEWS
18 RELEASE --

19 THE COURT: WAIT A SECOND.

20 MR. HAWK: -- A PRESS RELEASE ISSUED BY RSA AND
21 CYLINK BACK IN 1988, ANNOUNCING A JOINT MARKETING
22 AGREEMENT BETWEEN RSA AND CYLINK.

23 AND THE REASON, YOUR HONOR, THAT THIS IS SO
24 IMPORTANT, IS THAT IT IS FROM EIGHT YEARS AGO, AND IT
25 TALKS ABOUT, THAT THIS JOINT MARKETING AGREEMENT BETWEEN

1 RSA AND CYLINK COVERED THE BSAFE PRODUCT, THE OEM TOOLKIT
2 THAT IS AT THE VERY HEART OF THE INFRINGEMENT CLAIMS THAT
3 CYLINK IS BRINGING. AND WHAT IT DOES IS ESTABLISH THAT
4 CYLINK HAD TO KNOW EIGHT YEARS AGO WHAT BSAFE WAS, HOW IT
5 WAS USED, AND KNOW THE BASIS OF ITS CONTRIBUTORY
6 INFRINGEMENT CLAIMS THAT IT DIDN'T BRING UNTIL EIGHT YEARS
7 LATER, OR ALMOST EIGHT YEARS LATER, LATE LAST YEAR.

8 BUT WHAT DOES THE NEWS RELEASE SAY? IT TALKS
9 ABOUT:

10 "RSA DATA SECURITY AND CYLINK CORPORATION
11 TODAY ANNOUNCED THAT THEY SIGNED A WORLDWIDE
12 JOINT MARKETING AGREEMENT COVERING NEW AND
13 EXISTING PRODUCTS OF BOTH COMPANIES. THE
14 PRODUCTS COVERED BY THE AGREEMENT INCLUDE RSA'S
15 MAILSAFE AND BSAFE SOFTWARE PACKAGES, AND
16 CYLINK'S NEW PC ENCRYPTOR."

17 BUT IT NOT ONLY POINTS OUT BSAFE, IT ACTUALLY
18 SAYS -- LET'S SEE IF I CAN GET IT A LITTLE CLEARER -- IT
19 SAYS WHAT BSAFE IS.

20 ADDITIONALLY, BSAFE OEMS CAN SUPPORT HIGH-SPEED
21 DATA PRIVACY AND AUTHENTICATION APPLICATIONS. ACCORDING
22 TO JIM BIDZOS, PRESIDENT OF RSA:

23 "BSAFE PROVIDES AN API (APPLICATION
24 PROGRAMMING INTERFACE) FOR DEVELOPERS TO
25 INTEGRATE PRIVACY AND AUTHENTICATION

1 CAPABILITIES INTO THEIR PRODUCTS."

2 SO, IN OTHER WORDS, BACK IN '88, CYLINK KNOWS
3 ABSOLUTELY THEY'RE HELPING THE MARKET BE SAFE. THEY KNOW
4 EXACTLY WHAT IT'S FOR EIGHT YEARS AGO.

5 YOU GO DOWN TO THIS PARAGRAPH: "RSA ALSO OFFERS
6 BSAFE, A CRYPTOGRAPHIC TOOLKIT FOR OEMS."

7 THIS IS WHAT CYLINK DOES NOT WANT YOU TO
8 CONSIDER WHEN YOU'RE CONSIDERING THE EQUITIES OF THIS
9 INFRINGEMENT CLAIM; I.E., THAT EIGHT YEARS AGO, CYLINK
10 KNEW EXACTLY WHAT RSA WAS UP TO.

11 THE COURT: BUT THAT FELL APART AND THEY
12 COULDN'T WORK IT OUT, AND TRYING TO TAKE PKP APART, THEN
13 IT WENT BACK TO ARBITRATION, AND IT DIDN'T RESOLVE ALL THE
14 PROBLEMS, APPARENTLY.

15 MR. HAWK: THAT'S RIGHT, YOUR HONOR. PKP --

16 THE COURT: DO YOU FEEL THAT THE ARBITRATORS
17 MISSED SOMETHING?

18 MR. HAWK: I'M SORRY, YOUR HONOR?

19 THE COURT: DO YOU FEEL THAT THE ARBITRATION
20 PANEL MAY HAVE MISSED SOME THINGS THAT THEY WOULD HAVE
21 HANDLED DIFFERENTLY; IT WOULDN'T HAVE HAPPENED THE WAY
22 THAT IT DID, IF THEY GOT A CHANCE TO LOOK AT IT? THEY'VE
23 HAD THE EXPERTS; THEY'VE HAD A LOT OF TIME AND EXPERIENCE
24 WITH IT.

25 AND THESE ARE ARBITRABLE MATTERS THAT WE ARE

1 TALKING ABOUT, AND I'M NOT RULING RIGHT NOW, BUT I'M
2 SAYING THE REASON FOR IT IS THAT MAYBE THEY COULD CLARIFY
3 A LOT OF THINGS THAT THEY WERE AMBIGUOUS AND WEREN'T
4 HANDLED PROPERLY AS A RESULT OF THE SOLVING --

5 MR. HAWK: WHAT I DON'T THINK THEY COULD
6 CLARIFY, YOUR HONOR, NUMBER ONE, THEY WOULDN'T HAVE ALL OF
7 THE EVIDENCE BEFORE THEM THAT HAS BEEN DEVELOPED IN THIS
8 CASE. AND I THINK THAT'S CRITICAL.

9 CYLINK HAS ASKED THEM NOT TO CONSIDER ANY OF
10 THAT. AND I THINK THAT DOES A GREAT DISSERVICE, AND, IN
11 FACT, IS FUNDAMENTALLY UNFAIR TO RSA AT THIS POINT IN
12 TIME.

13 AND I WANT TO TALK ABOUT THAT ON THE WAIVER
14 POINT, BECAUSE I DO BELIEVE THERE IS AN ABSOLUTELY, JUST A
15 VERY, VERY STRONG GROUND FOR WAIVER IN THIS CASE.

16 THE COURT: WHAT WOULD BE THE TIME ELEMENT
17 INVOLVED IN A REMAND?

18 MR. HAWK: WHAT WOULD BE THE TIME ELEMENT
19 INVOLVED?

20 THE COURT: THEY WOULD HAVE A HEARING --

21 MR. HAWK: I THINK THAT'S UNCLEAR AT THIS POINT,
22 YOUR HONOR. THERE IS NO WAY THAT THE COURT CAN REALLY
23 CONTROL OR THE PARTIES CAN CONTROL WHAT'S GOING TO HAPPEN.

24 AND THERE IS NO WAY THAT THIS COURT CAN
25 GUARANTEE, EVEN IF THE TWO ISSUES WERE REMANDED BACK DOWN,

1 THE TWO ISSUES AS THEY HAVE BEEN FRAMED BY CYLINK, IF
2 THOSE TWO ISSUES WERE REMANDED, YOU DON'T KNOW WHAT KIND
3 OF ANSWER YOU'RE GOING TO GET.

4 THE COURT: NO.

5 MR. HAWK: YOU DON'T KNOW IF IT'S GOING TO BE
6 SATISFACTORY; YOU DON'T KNOW IF IT'S GOING TO BE ENOUGH
7 FOR YOU TO BE ABLE TO THEN APPLY THESE DEFENSES.

8 AND WHAT COULD BE INVOLVED IS EXACTLY WHAT
9 HAPPENED TO JUDGE LETTS, IS THAT HE DIDN'T GET A CLEAR
10 ANSWER AT ALL. THE PARTIES WERE ARGUING ABOUT WHAT IT
11 MEANT, AND IT CAUSED A LOT OF DELAY IN THE CASE.

12 BUT LET ME MOVE ON, THEN, TO REALLY A MORE
13 IMPORTANT POINT. AND THAT POINT IS, IS THAT BECAUSE THERE
14 IS NO LAW OUT THERE, WHERE COURTS HAVE ACTUALLY STRIPPED
15 AWAY DEFENSES, THERE IS A VERY GOOD REASON FOR THAT,
16 PARTICULARLY IN THE REALM OF PATENT INFRINGEMENT DEFENSES.

17 THE REASON IS, IS THAT THOSE DEFENSES HAVE TO BE
18 DECIDED IN THE CONTEXT OF THE CLAIMS THEMSELVES. NOBODY
19 IN THIS CASE IS ARGUING THAT THE INFRINGEMENT CLAIMS
20 THEMSELVES SHOULD BE REMANDED BACK DOWN TO THE
21 ARBITRATORS. THE AGREEMENTS DON'T PROVIDE FOR ARBITRATION
22 OF INFRINGEMENT CLAIMS.

23 BUT WHAT WE HAVE HERE IS AN ATTEMPT TO TRY AND
24 BREAK OUT CORE PATENT INFRINGEMENT DEFENSES. AND WHAT IS
25 PECULIAR ABOUT PATENT INFRINGEMENT DEFENSES, OR MAYBE IT'S

1 NOT PECULIAR TO THEM, BUT IT'S PECULIAR TO EQUITABLE
2 DEFENSES, IS THAT THE COURT HAS TO WEIGH THE EVIDENCE ON
3 BOTH SIDES. IT HAS TO WEIGH THE EVIDENCE THAT WOULD
4 ESTABLISH THE DEFENSES THEMSELVES; AND THEN IT HAS TO
5 WEIGH THAT AGAINST THE EQUITIES OF THE CLAIMS THAT
6 CYLINK -- THE INFRINGEMENT CLAIMS THAT ARE BEING MADE.

7 YOUR HONOR IS BEING ASKED TO IMPOSE AN
8 INJUNCTION THAT WOULD VERY SERIOUSLY INJURE OUR CLIENT,
9 RSA. AND --

10 THE COURT: IN WHAT SENSE? IN WHAT SENSE WOULD
11 I BE IMPOSING AN INJUNCTION?

12 MR. HAWK: THAT'S WHAT THEY'RE ASKING FOR, YOUR
13 HONOR. THAT'S PART OF THE ULTIMATE RELIEF BECAUSE OF THE
14 PATENT INFRINGEMENT CLAIMS --

15 THE COURT: UNTIL THE ARBITRATION IS COMPLETED,
16 YOU MEAN.

17 MR. HAWK: THE ULTIMATE RESULT OF WHAT THESE
18 PATENT INFRINGEMENT CLAIMS BROUGHT BY CYLINK IS, IS TO ASK
19 FOR AN INJUNCTION. THEY'RE ASKING FOR DAMAGES, BUT
20 THEY'RE ALSO ASKING FOR AN INJUNCTION.

21 AND BECAUSE THEY'RE ASKING FOR EQUITABLE RELIEF,
22 THERE ARE EQUITABLE DEFENSES. EQUITABLE ESTOPPEL,
23 OBVIOUSLY IT'S AN EQUITABLE DEFENSE; LACHES, OBVIOUSLY AN
24 EQUITABLE DEFENSE.

25 AND WHAT THE AUCKERMAN CASE SAYS -- AND YOUR

1 HONOR MAY REMEMBER THIS CASE, BECAUSE IT WAS BEFORE YOU IN
2 THE TRIAL COURT AND THEN WENT UP TO THE FEDERAL CIRCUIT --
3 THE AUCKERMAN FEDERAL CIRCUIT CASE SAYS THAT IN
4 DECIDING -- AND IT WAS TALKING ABOUT EQUITABLE ESTOPPEL,
5 WHICH IS A DEFENSE IN THIS CASE -- "THE COURT MUST
6 CONSIDER ANY EVIDENCE AND FACTS REGARDING THE EQUITIES OF
7 THE PARTIES IN ADDITION TO EVIDENCE BEARING ON SPECIFIC
8 ELEMENTS OF THE DEFENSE."

9 THE POINT I'M TRYING TO MAKE, YOUR HONOR, IS
10 THAT YOU'RE NOT GOING TO BE ABLE TO JUST POSE A "YES" OR
11 "NO" QUESTION BACK DOWN TO THESE ARBITRATORS. BECAUSE OF
12 THE VERY NATURE OF THE DEFENSES THAT ARE AT STAKE HERE,
13 THE EQUITABLE ESTOPPEL AND THE LACHES, IT'S NOT A "YES" OR
14 "NO" ISSUE. IT IS AN ISSUE THAT YOU NEED TO HEAR THE
15 EVIDENCE; YOU NEED TO HEAR EVIDENCE AND SEE EVIDENCE LIKE
16 I JUST PUT UP THERE ON THE SCREEN. YOU NEED TO DECIDE HOW
17 STRONG THAT EVIDENCE IS, OR HOW WEAK THAT EVIDENCE IS, AND
18 THEN YOU NEED TO WEIGH IT AGAINST THE EQUITIES OF THE
19 INFRINGEMENT CLAIMS.

20 AND YOU HAVE TO DO THAT BEFORE YOU COULD EVEN
21 CONSIDER GRANTING THE EQUITABLE INJUNCTION THAT CYLINK IS
22 ASKING FOR. THAT IS REALLY THE MAIN PROBLEM WITH THIS
23 PARTICULAR BRAND OF ARBITRATION REMAND THAT CYLINK IS
24 ASKING FOR.

25 LET ME MOVE ON, THOUGH, IF I CAN, TO THE WAIVER,

1 UNLESS YOU HAVE SOME MORE QUESTIONS ON THIS POINT.

2 THE COURT: WELL, ONE COULD SORT OF WONDER
3 WHETHER THIS WOULD DELAY THE FINAL RESOLUTION OR SPEED UP
4 THE FINAL RESOLUTION.

5 MR. HAWK: IF YOU WERE TO REMAND IT?

6 THE COURT: YES.

7 MR. HAWK: WELL, I DON'T KNOW THE ANSWER --

8 THE COURT: THERE COULD BE A DIFFERENCE OF
9 OPINION ON THAT, BUT I'M JUST CURIOUS WHAT EACH WOULD SAY.

10 I WOULD LIKE TO SEE THE PROBLEM RESOLVED AS
11 EQUITABLY AND RAPIDLY AS POSSIBLE. IT IS A VERY DIFFICULT
12 PROBLEM AND A VERY SERIOUS ONE TO YOUR COMPANIES AND TO
13 THE INDUSTRY, AND THE MORE STALLED, THE WORSE IT IS. BUT
14 I WOULD LIKE TO HAVE SOMETHING THAT WOULD EXPEDITE THE
15 MATTER, IF THIS WILL DO THAT, AND PERHAPS NARROW SOME OF
16 THE ISSUES.

17 NOW, IF THAT'S GOING TO CONFUSE IT AND NOT DO
18 THAT, IT MIGHT BE A BAD MOVE. IF THERE WAS AGREEMENT,
19 THAT MIGHT BE HELPFUL.

20 MR. HAWK: WELL, I THINK THERE IS CERTAINLY A
21 VERY GOOD CHANCE, IF YOU LOOK AT THOSE MIT CASE
22 TRANSCRIPTS AND WHAT JUDGE LETTS WENT THROUGH IN THAT
23 CASE, THAT IT'S NOT GOING TO ADVANCE THE BALL AT ALL;
24 THAT, FIRST OF ALL, YOU'RE GOING TO GET A DECISION OUT OF
25 THE ARBITRATORS. IT'S GOING TO BE A "YES" OR "NO"

1 DECISION, AT BEST.

2 AND THE "YES" OR "NO" DECISION, IF YOU CAN
3 DIVINE THAT OUT OF THE DECISION -- AND THAT IS A TASK, AS
4 YOUR HONOR KNOWS, BECAUSE YOU HAD TO TRY AND DO IT
5 BEFORE -- IF THERE IS A "YES" OR "NO" DECISION, AT BEST,
6 THAT IS STILL NOT GOING TO KEEP YOUR HONOR FROM HAVING TO
7 WEIGH THE EVIDENCE.

8 YOU'RE GOING TO HAVE TO CONSIDER ALL THE
9 EVIDENCE. RSA IS JUST GOING TO HAVE TO BE ENTITLED TO
10 DEVELOP EVIDENCE ON THESE ISSUES IN THIS CASE.

11 WE OUGHT TO BE ENTITLED TO DEVELOP EVIDENCE ON
12 LACHES, BECAUSE THAT'S AN EQUITABLE DEFENSE BEFORE YOUR
13 HONOR, AND THAT'S A DEFENSE WHERE YOU NEED TO HEAR AND
14 WEIGH THE EVIDENCE AGAINST THE EQUITIES ON THEIR SIDE.

15 SO, YOU KNOW, I CAN'T SEE AT ALL HOW THIS IS
16 LIKELY TO SPEED THINGS ALONG, HOW IT'S LIKELY TO SIMPLIFY
17 THINGS.

18 I THINK YOU'RE JUST GOING TO BE FACED WITH A
19 SITUATION LIKE YOU WERE BEFORE, WHERE YOU'RE TRYING TO
20 DIVINE WHAT THE ARBITRATION MEANT. AND THEN YOU'RE GOING
21 TO HAVE TO END UP WEIGHING THE EVIDENCE YOURSELF ANYWAY.

22 BUT IF I COULD MAKE THE POINT ON WAIVER, YOUR
23 HONOR, I DON'T REALLY HAVE A LOT TO ADD TO THE PAPERS, BUT
24 I THINK REALLY THE OVERARCHING STANDARD IN BOTH THE
25 FEDERAL AND THE STATE CASES, APPEARS TO TURN ON A REAL

1 COMMON SENSE INQUIRY. AND THAT IS: DO THE FACTORS OF
2 DELAY -- AND THERE HAS BEEN DELAY IN THIS CASE, IN MAKING
3 THIS MOTION FOR REMAND -- AND OTHER ACTS INCONSISTENT WITH
4 ARBITRATION, DO THOSE FACTORS MAKE AN ORDER TO ARBITRATE
5 NOW UNFAIR? AND I THINK THE CLEAR ANSWER TO THAT IS YES,
6 YOUR HONOR.

7 THE DELAY IN THIS CASE HAS BEEN VERY
8 SIGNIFICANT, BECAUSE OF THE CONTEXT OF THE SCHEDULE IN
9 THIS CASE.

10 AS YOUR HONOR WILL RECALL, CYLINK HAS PRESSED
11 VERY, VERY HARD -- AND MAYBE THEY HAVE GOOD REASONS FOR
12 PRESSING HARD -- BUT THEY PRESSED HARD FOR AN EARLY TRIAL
13 DATE AND A COMPRESSED PRETRIAL AND DISCOVERY SCHEDULE.

14 BUT HAVING PRESSED FOR THAT, IT OUGHT TO BE
15 INCUMBENT ON CYLINK, AND IT SHOULD HAVE BEEN INCUMBENT ON
16 CYLINK TO EARLY ON, IF THEY WERE GOING TO TRY AND CHANGE
17 THE LANDSCAPE OF THIS CASE RADICALLY, WHICH IS WHAT
18 THEY'RE TRYING TO DO RIGHT HERE BY PUTTING OUT FOUR CORE
19 PATENT INFRINGEMENT DEFENSES AND HAVING THEM THROWN DOWN
20 TO THE ARBITRATORS, IF THEY WERE GOING TO DO THAT, THEY
21 SHOULD HAVE DONE IT MUCH, MUCH EARLIER THAN THEY DID IN
22 THIS CASE.

23 THE REASON THAT THE DELAY IS SO SIGNIFICANT IS
24 THAT IT COMES FOUR MONTHS AFTER YOUR HONOR RULED THAT
25 THERE WAS NO RES JUDICATA OR COLLATERAL ESTOPPEL EFFECT OF

1 THAT EARLIER ARBITRATION DECISION. AND THAT IS WHAT
2 CYLINK RELIES SO HEAVILY ON. THEY SAY, "OH, WE'VE ALWAYS
3 TAKEN THE POSITION, YOUR HONOR, THAT ARBITRATION IS IN
4 THIS CASE, AND THAT WE THOUGHT THESE ISSUES WERE
5 ARBITRABLE."

6 BUT THERE IS A BIG DIFFERENCE IN SAYING THAT THE
7 ISSUES HAVE ALREADY BEEN DECIDED BY ARBITRATION ON THE ONE
8 HAND, AND THEN SAYING, "WELL, YOU KNOW, WE LOST THAT ONE,
9 AND NOW WE'VE WAITED FOUR MONTHS AND NOW WE WANT TO REMAND
10 THEM ALL TO ARBITRATION."

11 AND THEY'RE NOT ONLY SAYING THAT, YOUR HONOR,
12 THEY'RE SAYING IT AFTER HAVING ARGUED THE MERITS OF THE
13 PARTICULAR LICENSE DEFENSES IN THIS CASE, AND HAVING LOST
14 ESSENTIALLY ON TWO OF THE THREE MOTIONS ON THE MERITS.
15 THEY NOW WANT TO CHANGE THE RESULT. BUT LET ME GET TO
16 THAT IN JUST A MINUTE.

17 THE DELAY IS ALL THE MORE SIGNIFICANT IN THIS
18 CASE, YOUR HONOR, BECAUSE, IN THE DEFENDANTS' CASE
19 MANAGEMENT STATEMENT, WHICH CAME AFTER YOUR HONOR'S RULING
20 THAT THERE WAS NO RES JUDICATA OR COLLATERAL ESTOPPEL
21 EFFECT, WHAT CYLINK TOLD THE COURT AND TOLD RSA WAS THAT
22 THE CORE PRINCIPAL ISSUES IN THIS CASE INCLUDE LACHES,
23 INCLUDE EQUITABLE ESTOPPEL.

24 AND THAT'S THE ONLY OTHER OVERHEAD THAT I'LL PUT
25 UP, YOUR HONOR, IS I JUST WANT YOU TO SEE WHAT WAS SERVED

1 BACK IN APRIL IN THIS CASE, AND WHAT RSA HAS PROCEEDED
2 BASED ON, AND WHAT THE LOCAL RULES TELL US THAT WE CAN
3 PROCEED BASED ON, IN PREPARING OUR DEFENSES.

4 IT WAS IN APRIL, THE DEFENDANTS' CASE MANAGEMENT
5 STATEMENT AND PROPOSED ORDER, THE SECTION STARTING ON PAGE
6 TWO DOWN HERE, THE PRINCIPAL LEGAL ISSUES WHICH THE
7 PARTIES DISPUTE. AND THEN LISTING THOSE PRINCIPAL LEGAL
8 ISSUES, CYLINK TELLS US THAT ONE OF THE ISSUES, THE 1(C),
9 WHETHER CKC/CYLINK'S INFRINGEMENT CLAIMS ARE BARRED OR
10 LIMITED BY THE DOCTRINES OF EQUITABLE ESTOPPEL, FIRST
11 SALE-PATENT EXHAUSTION, OR IMPLIED LICENSE.

12 THEY ALSO, DOWN IN (H), LIST: "WHETHER
13 CYLINK/CKC'S CLAIMS ARE BARRED BY LACHES."

14 IT'S NOT UNTIL THREE MONTHS LATER THAT THEY COME
15 INTO THIS COURT AND SAY, "WELL, WE DON'T REALLY HAVE AN
16 EXPLANATION OF WHY WE TOLD YOUR HONOR AND WHY WE TOLD RSA
17 THAT THESE ISSUES WERE IN THE CASE. WE'RE NOW GOING TO
18 TRY AND GET THEM OUT OF THE CASE AND SEND THEM DOWN TO
19 ARBITRATION."

20 AND IN THAT INTERVENING THREE-MONTH PERIOD, A
21 LOT OF WATER PASSED UNDER THE BRIDGE, YOUR HONOR, AND WE
22 ARE NOW VERY CLOSE TO A NOVEMBER 22ND CUTOFF. AND THE
23 SIMPLE FACT IS, IS THAT CYLINK OUGHT TO BE HELD TO WHAT
24 THEY SAID IN THIS CASE MANAGEMENT STATEMENT.

25 THEY CAN'T SAY THEY WERE SURPRISED, BECAUSE THEY

1 ALREADY KNEW THAT YOUR HONOR HAD RULED THAT THERE WAS NO
2 RES JUDICATA OR COLLATERAL ESTOPPEL EFFECT. AND, IN FACT,
3 THERE WAS NO EXPLANATION IN THEIR PAPERS OF WHY THEY
4 SERVED SUCH A DOCUMENT AFTER YOUR HONOR RULED THAT, AND
5 THEN WHY THEY SHOULD NOW BE PERMITTED TO GO BACK ON THAT.

6 I REALLY DON'T THINK THAT THERE IS, AMONG THE
7 CASES THAT ARE CITED, THERE IS NOT ANY STRONGER BASIS FOR
8 WAIVER THAN THAT, YOUR HONOR, THE DELAY, AND THEN TELLING
9 THE COURT AND RSA SPECIFICALLY THAT THESE ISSUES ARE IN
10 THE CASE, AND THEN NOT BEING ABLE TO EXPLAIN WHY THEY THEN
11 WAITED OR WHY THEY SERVED THAT EARLIER PAPER.

12 REALLY THE FINAL POINT I WANTED TO MAKE, THOUGH,
13 IS PERHAPS THE MOST IMPORTANT. AND THAT IS: WHAT IS
14 GOING ON HERE IS UNABASHED FORUM SHOPPING.

15 WHAT HAPPENED IS THAT CYLINK CAME INTO THIS
16 COURT AND MOVED YOUR HONOR FOR A PRELIMINARY INJUNCTION.
17 RSA CAME BACK AND HAS SAID, ONE OF THE REASONS YOUR HONOR
18 SHOULDN'T GRANT THAT PRELIMINARY INJUNCTION IS BECAUSE WE
19 HAVE LICENSE DEFENSES, AND, IN FACT, WE HAVE QUITE
20 COMPELLING EVIDENCE THAT SHOWS THAT CYLINK KNEW WHAT WAS
21 GOING ON IN '88, KNEW WHAT WAS GOING ON IN 1990, WHEN THAT
22 PUBLIC KEY PARTNERSHIP WAS FORMED, AND ALSO, EVEN AS LATE
23 AS 1995, WAS SAYING THAT WE DON'T HAVE ANY PROBLEM WITH
24 THESE OEM LICENSES.

25 AND ALL OF THAT EVIDENCE WAS IN THE PAPERS. AND

1 WHAT CYLINK DID, IN RESPONSE TO THAT -- FIRST OF ALL, THEY
2 SAID, "YOUR HONOR, IT'S ALREADY BEEN DECIDED BY THE
3 ARBITRATORS."

4 YOUR HONOR LOOKED AT THAT, SAID, "NO, I'M SORRY,
5 YOU'RE WRONG. IT HASN'T BEEN DECIDED."

6 BUT CYLINK ALSO ARGUED ON THE MERITS OF THOSE
7 LICENSE DEFENSES.

8 AND WE POINT OUT IN OUR PAPER, BOTH THE ARGUMENT
9 AND THE EVIDENCE SUBMITTED, THEY ALSO DEPOSED RSA'S
10 PRESIDENT, JIM BIDZOS, ON THE MERITS OF THE LICENSE
11 DEFENSES. THEY TOOK THEIR SHOT. THEY WON IN THE
12 PRELIMINARY INJUNCTION. THEY TOOK THEIR SHOT ON THE
13 MERITS OF THE LICENSE DEFENSES, BOTH THERE AND IN OPPOSING
14 RSA'S SUMMARY JUDGMENT MOTION ON THE LICENSE DEFENSES, AND
15 THEY LOST, IN ESSENCE, ON THE PRELIMINARY INJUNCTION.
16 THEY DID NOT CONVINCE YOUR HONOR THAT THE LICENSE DEFENSES
17 WERE WITHOUT MERIT, DESPITE THREE ATTEMPTS TO DO SO.

18 AND, IN FACT, YOUR HONOR'S ORDER DENYING THE
19 PRELIMINARY INJUNCTION CITES THE LICENSE DEFENSES AS ONE
20 OF THE REASONS THAT YOU WERE FINDING THE WAY YOU DID ON
21 LIKELIHOOD OF SUCCESS.

22 SO, THE CASES PLAINLY ESTABLISH THAT WHEN YOU
23 HAVE JUDICIAL LITIGATION ON THE MERITS, THAT IS AN
24 UNEQUIVOCAL CASE FOR WAIVER. AND WHAT HAS HAPPENED IN
25 THIS CASE IS THAT YOU HAVE HAD -- WE ALL HAVE HAD JUDICIAL

1 LITIGATION ON THE MERITS; CYLINK HAS TRIED TO TEST THE
2 WATERS. THEY DIDN'T LIKE THE FEEL OF THE WATERS. THEY
3 SAT AROUND FOR A WHILE HOPING, PRESUMABLY, THAT MAYBE THEY
4 COULD REVERSE YOUR HONOR ON THE ISSUE OF RES JUDICATA
5 COLLATERAL ESTOPPEL.

6 THEY FINALLY DECIDED, JUST LESS THAN A MONTH
7 AGO, THAT MAYBE THAT WASN'T THE BEST STRATEGY; MAYBE IT'S
8 BEST TO CHANGE HORSES, SO TO SPEAK, RIGHT NOW, YOUR HONOR;
9 MAYBE IT'S TIME TO CHANGE FORUMS AND KICK THESE ISSUES
10 BACK DOWN TO THE ARBITRATORS, WHERE THEY HOPE THEY WILL
11 HAVE A BETTER CHANCE.

12 YOUR HONOR SHOULDN'T LET THEM DO THAT. IT'S
13 FUNDAMENTALLY UNFAIR, AND IT'S FUNDAMENTALLY CONTRARY TO
14 THE CASES THAT SAY YOU CAN'T FORUM SHOP. ONCE THERE HAS
15 BEEN A LITIGATION ON THE MERITS OF DEFENSES OR ISSUES, YOU
16 CAN'T THEN CHANGE THEM AND KICK THEM DOWN TO ARBITRATION.

17 THE COURT: THANK YOU.

18 MR. FLINN: I HOPE MR. HAWK WILL LEAVE THESE
19 THINGS.

20 MR. HAWK: SURE. WHAT DO YOU NEED?

21 MR. FLINN: ALL OF THEM, ALL THREE OF THEM.

22 LET ME JUMP TO THE SPEED ISSUE, YOUR HONOR.

23 THE COURT: DO YOU CONTEMPLATE THAT YOU WILL BE
24 REOPENING ISSUES THAT HAVE BEEN RESOLVED IN THE
25 ARBITRATION?

1 MR. FLINN: NO. I ASSUME THEY WILL TELL US WHAT
2 THEY'VE ALREADY DECIDED AND ONLY REOPEN THINGS THAT THEY
3 NEED TO DECIDE.

4 NUMBER TWO, WE DON'T PROPOSE TO, YOU KNOW -- IF
5 YOUR HONOR REMANDS, THE ARBITRATORS WILL CONSIDER WHAT
6 OTHER EVIDENCE RSA CAN PERSUADE THEM THEY OUGHT TO HEAR.

7 AND INTERESTINGLY, THIS DOCUMENT THAT MR. HAWK
8 PUT UP, IT WAS CERTAINLY FAMILIAR TO ME BECAUSE IT WAS AN
9 EXHIBIT IN THE ARBITRATION. AND RSA'S LAWYER IN THE
10 ARBITRATION SPENT A FAIR AMOUNT OF TIME ASKING CYLINK
11 WITNESSES ABOUT WHAT THEY KNEW IN 1988. SO FROM US NOT
12 WANTING THE ARBITRATORS TO SEE THAT, THE ARBITRATORS SAW
13 IT. BUT THEY CAN SEE IT AGAIN, IF THERE IS A NEED TO DO
14 THAT.

15 SIMILARLY, IF THERE IS SOME NEED FOR ADDITIONAL
16 DISCOVERY, WE DID DISCOVERY THE FIRST TIME AROUND IN
17 ARBITRATION, AND IF THERE IS ADDITIONAL THAT NEEDS TO BE
18 DONE IN DISCOVERY, THEY CAN DO THAT.

19 BUT ON THE ISSUE OF SPEED, IT'S NOT CITED IN THE
20 BRIEFS, BECAUSE IT WASN'T RAISED THIS WAY, BUT IF WE, AS
21 THE PARTY SEEKING ARBITRATION, DO NOT DO WHATEVER NEEDS TO
22 BE DONE TO EXPEDITE IT, YOUR HONOR DOES HAVE THE RIGHT TO
23 PULL IT BACK. SO IF WE ARE OBSTREPEROUS OR UNCOOPERATING,
24 NOT DOING WHAT WE NEED TO DO TO GET THIS CASE DECIDED
25 PROMPTLY IN THE ARBITRATION PANEL IN THE MATTER OF THE

1 NEXT FEW MONTHS, THEN YOUR HONOR CAN TAKE IT BACK.

2 BUT I THINK THAT THERE IS NO REASON AT THIS
3 POINT TO BELIEVE THAT IT CAN'T BE DONE QUITE
4 EXPEDITIOUSLY, AND WE BELIEVE THE ARBITRATION PANEL HAS --
5 WE SHOULD AT LEAST HEAR FROM THEM AS TO WHETHER THEY THINK
6 THIS CAN BE DONE IN A PROMPT MANNER.

7 I WAS ALSO STRUCK BY THIS WAIVER ISSUE BY THIS
8 PARTICULAR DOCUMENT, THIS DEFENDANTS' CASE MANAGEMENT
9 STATEMENT. THIS PARTICULAR PAGE WAS ONLY ON FOR A SECOND.

10 BUT I THINK WE WANT TO TAKE A LOOK AT IT. IT
11 SAYS "PRINCIPAL LEGAL ISSUES WHICH THE PARTIES DISPUTE."
12 THE VERY FIRST STATEMENT IS BASED UPON INFORMATION THAT
13 RSA HAS PROVIDED, DEFENDANTS IDENTIFIED. WE WERE SIMPLY
14 LISTING HERE FOR YOUR HONOR'S CONVENIENCE ALL THE THEORIES
15 WE UNDERSTOOD THEM TO BE PROPOUNDING.

16 BEAR IN MIND THIS DOCUMENT WAS ALSO SUBMITTED AT
17 A TIME IN WHICH WE HAD CONTENTED AND YOUR HONOR HAD TAKEN
18 UNDER SUBMISSION THE PROPOSITION THAT THOSE ISSUES HAD
19 ALREADY BEEN DECIDED. IT WOULD BE A LITTLE UNUSUAL FOR
20 US, HAVING ARGUED AND YOUR HONOR NOT HAVING RULED, THAT WE
21 OUGHT TO SEND SOMETHING TO ARBITRATION WHEN OUR POSITION
22 HAS BEEN THAT THE MATTER HAS ALREADY BEEN ARBITRATED.

23 ON A RELATED QUESTION, MR. HAWK, I DON'T
24 BELIEVE, WAS IN THE ROOM AT THE TIME, BUT I REMEMBER
25 VIVIDLY STANDING HERE IN FRONT OF YOUR HONOR ON THAT

1 PRELIMINARY INJUNCTION MOTION, AND DID I DO ANYTHING THAT
2 SUGGESTED THAT I DIDN'T THINK THESE ISSUES ARE ARBITRABLE?
3 WHAT I SAID TO YOUR HONOR, AND I BELIEVE WE QUOTED THE
4 TRANSCRIPT IN OUR PAPERS, WAS: "IF THESE ISSUES HAVE NOT
5 ALREADY BEEN ARBITRATED," I SAID TO YOUR HONOR, "THEY ARE
6 ARBITRABLE." AND WE HAVE SAID THAT CONSISTENTLY
7 THROUGHOUT.

8 NOW, WE HAVE DEALT WITH SOME COMPLICATED
9 SCIENTIFIC SUBJECTS IN THE LAST THREE DAYS, BUT I DO
10 BELIEVE WE HAVE NOT CHANGED THE RULES OF TIME AND SPACE,
11 AND IT HAS NOT BEEN FOUR MONTHS SINCE YOUR HONOR'S MAY
12 17TH DECISION FOR US TO MAKE THE REMAND MOTION. THE
13 CORRECT DATES ARE MAY 17TH AND AUGUST 21ST.

14 AND TO EXPLAIN A LITTLE BIT OF THAT DELAY, THE
15 TIME WAS TAKEN UP FIRST BY UNDERSTANDING AND ANALYZING
16 YOUR HONOR'S DECISION; IT WAS TAKEN UP BY THE EVALUATION
17 OF WHETHER OR NOT TO GO BACK TO THE ARBITRATORS FIRST, TO
18 GO TO YOUR HONOR FIRST, OR TO DO BOTH, AS WE ULTIMATELY
19 DECIDED; IT WAS TAKEN UP BY DETERMINING WHETHER OR NOT WE
20 WANTED TO WAIVE ARBITRATION; AND, FRANKLY, IT WAS TAKEN UP
21 BECAUSE MANY OF THE PRINCIPAL LAWYERS INVOLVED IN THIS
22 COMPLICATED DECISION TOOK VACATIONS DURING THAT PERIOD.

23 THIS WAS THE SUMMER MONTHS. AND A PERIOD OF
24 ABOUT 12 WEEKS ELAPSED BETWEEN YOUR HONOR'S RULING AND OUR
25 MOTION, IN WHICH ALL OF THOSE THINGS, INCLUDING WRITING

1 ALL THE BRIEFS BOTH TO THE ARBITRATION PANEL AND TO YOUR
2 HONOR, WERE PREPARED. AND THAT, I BELIEVE, IS NOT THE
3 SORT OF DELAY THAT IS AT ISSUE HERE.

4 IN THE FINAL ANALYSIS, IF YOU REMAND THIS BACK
5 TO THE ARBITRATORS, WHAT YOU DESCRIBED AS THE DISPOSITIVE
6 ISSUE, WHEN YOU DENIED THE SUMMARY JUDGMENT MOTION,
7 THEY'RE WAITING TO HEAR FROM YOU, AND THEY COULD TELL YOU,
8 "WE WON'T DECIDE IT. WE CAN'T DECIDE IT. WE DON'T WANT
9 TO DECIDE IT," YOU MAY HAVE SOME OTHER INFORMATION.

10 BUT I SUBMIT TO YOUR HONOR IF THEY SAY THEY ARE
11 READY, WILLING AND ABLE TO TAKE THIS ISSUE, HAVING ALREADY
12 HEARD A LOT OF THE EVIDENCE AND HEARING WHAT OTHER
13 EVIDENCE RSA CAN CONVINCE THEM THEY NEED TO HEAR, YOUR
14 HONOR WILL HAVE COMPLIED WITH THE FEDERAL ARBITRATION ACT,
15 AND YOUR HONOR WILL HAVE ADVANCED THE RESOLUTION OF THIS
16 CASE SUBSTANTIALLY.

17 THANK YOU.

18 MR. HAWK: YOUR HONOR, MAY I BE HEARD BRIEFLY
19 HERE?

20 THE COURT: YES.

21 MR. HAWK: ON JUST THE PRACTICAL ISSUE OF
22 WHETHER OR NOT THIS WILL MOVE THINGS ALONG OR WHETHER OR
23 NOT THIS WILL COMPLICATE AND DELAY THINGS, I THINK IT'S
24 ABSOLUTELY CLEAR, DEMONSTRABLY CLEAR, THAT THE CHANCES
25 THAT IT'S GOING TO DELAY THINGS AND IT'S GOING TO MAKE

1 YOUR JOB HARDER ARE VERY MUCH GREATER THAN IT'S GOING TO
2 BE THE OTHER WAY AROUND.

3 FIRST OF ALL, YOUR HONOR, YOU DECIDED EARLIER IN
4 THIS CASE THAT THE LICENSE DEFENSES HAD NOT BEEN DECIDED
5 BY THE ARBITRATORS, AND FURTHER, THAT THE EVIDENCE WASN'T
6 THERE FOR THE ARBITRATORS TO DECIDE THEM.

7 MR. FLINN JUST TELLS US RIGHT NOW THEY'RE NOT
8 WORRIED ABOUT DISCOVERY, THAT THERE WAS DISCOVERY TAKEN
9 BEFORE ON THE LICENSE ISSUES, PRESUMABLY DISCOVERY COULD
10 BE TAKEN AGAIN IN THE ARBITRATION ON THE LICENSE ISSUES,
11 IF THERE WAS A NEED FOR THAT.

12 IF WE'RE GOING TO GET INTO DISCOVERY, A SECOND
13 TRACK OF ARBITRATION DISCOVERY, YOU KNOW, I THINK THE
14 CHANCES, AGAIN, THAT IT'S GOING TO UNCOMPLICATE THINGS AND
15 SPEED THINGS ALONG ARE MINUSCULE.

16 IF YOU REMAND THIS, WHAT IS GOING TO HAPPEN IS
17 THAT IF THERE IS DISCOVERY ALLOWED -- AND I WILL TELL YOUR
18 HONOR THAT CYLINK HAS ASKED THAT THERE BE NO DISCOVERY
19 ALLOWED BECAUSE THEY DON'T WANT ANY DISCOVERY -- BUT, YOU
20 KNOW, SAY WE WERE ABLE TO QUOTE BACK AT THEM BEFORE THE
21 ARBITRATORS THIS STATEMENT BY MR. FLINN THAT WE COULD HAVE
22 SOME DISCOVERY -- AFTER YOU COMPLETE THAT DISCOVERY,
23 YOU'RE GOING TO HAVE TO GET THE SCHEDULES OF THE THREE
24 ARBITRATORS TOGETHER; YOU'RE GOING TO HAVE TO GET THE
25 SCHEDULES OF THE TRIAL COUNSEL, THE ARBITRATION COUNSEL

1 INVOLVED.

2 AND WITH A FEBRUARY 6TH TRIAL DATE, YOUR HONOR,
3 IT'S CLEAR TO ME -- AND I THINK IT SHOULD BE CLEAR TO
4 EVERYONE -- THAT THIS IS NOT GOING TO SPEED THINGS ALONG.
5 IT'S ONLY GOING TO DELAY THINGS, AND IT'S ONLY GOING TO
6 DELAY THINGS BECAUSE YOUR HONOR IS THEN GOING TO HAVE TO
7 DECIDE, IS GOING TO HAVE TO LOOK AT THE EVIDENCE ANYWAY.

8 THE ONLY OTHER POINT I WANTED TO ADDRESS WAS THE
9 POINT ABOUT THE DEFENDANTS' CASE MANAGEMENT STATEMENT.
10 FIRST OF ALL, WHAT MR. FLINN TRIES TO DO IS TO SAY THAT,
11 WELL, ALL WE WERE DOING WAS JUST REGURGITATING BACK TO THE
12 COURT WHAT RSA WAS TELLING US.

13 THAT'S NOT WHAT THE LOCAL RULES REQUIRED THEM TO
14 DO IN A CASE MANAGEMENT STATEMENT. IT REQUIRES THEM TO
15 IDENTIFY WHAT THEY SAY, AND IF THE PARTIES CAN'T AGREE,
16 AND THE PARTIES DIDN'T AGREE IN THIS CASE TO FILE A
17 COMBINED CASE MANAGEMENT STATEMENT, THEY NEED TO TELL US
18 WHAT THEY THINK THE ISSUES IN THE CASE ARE.

19 AND ONE NOTABLE OMISSION FROM WHAT THEY SAID IN
20 THAT CASE MANAGEMENT STATEMENT WAS THAT THERE WAS NO
21 MENTION, SOME THREE MONTHS AGO, OF ANY POSSIBILITY THAT
22 THEY WOULD BE SEEKING TO REMAND THE ISSUES THAT WERE
23 LISTED, THE LACHES ISSUE AND THE OTHER ISSUES.

24 CYLINK SHOULD BE HELD TO THAT CASE MANAGEMENT
25 STATEMENT, YOUR HONOR. IT WAS NOT DONE -- AND THE EXACT

1 DATES ARE IN THE PAPERS THAT WE SUBMITTED TO THE COURT --
2 YOUR HONOR'S DECISION, MAKING CLEAR THAT THERE WAS NO RES
3 JUDICATA OR COLLATERAL ESTOPPEL EFFECT, HAD ALREADY BEEN
4 DECIDED AT THE TIME THAT CASE MANAGEMENT STATEMENT WAS
5 FILED.

6 THE COURT: THANK YOU.

7 THE MATTER IS SUBMITTED. OKAY. I'LL GET IT OUT
8 AS SOON AS POSSIBLE, I ASSURE YOU.

9 MR. HAWK: THANK YOU, YOUR HONOR.

10 (PROCEEDINGS ADJOURNED AT 3:54 P.M.)

CERTIFICATE OF REPORTER

I, SARA L. LERSCHEN, CERTIFIED SHORTHAND
REPORTER NO. 6213 FOR THE STATE OF CALIFORNIA, DO HEREBY
CERTIFY THAT THE FOREGOING TRANSCRIPT, VOLUME 2, PAGES
NUMBERED 148 THROUGH 296, INCLUSIVE, CONSTITUTES A TRUE,
FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH CERTIFIED SHORTHAND REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE
BEST OF MY ABILITY.



SARA LERSCHEN, CSR, RPR, CM, CRR